



राजपत्र, हिमाचल प्रदेश (असाधारण)

हिमाचल प्रदेश राज्य शासन द्वारा प्रकाशित

शिमला, बुधवार, 8 मार्च, 2006/17 फाल्गुन, 1927

हिमाचल प्रदेश सरकार

निर्वाचन विभाग

अधिसूचना

शिमला-2, 17 फरवरी, 2006

संख्या 3-6/2005-ई०एल०एन०.—भारत निर्वाचन आयोग की अधिसूचना संख्या 82/हि० प्र०-वि०स०/(3-03)/05, दिनांक 19 जनवरी, 2006 तदनुसार 29 पौष, 1927 (शक) जिसमें 7-ठियोग विधान सभा निर्वाचन क्षेत्र से विधान सभा निर्वाचन-2003 को प्रश्नगत करने सम्बन्धी निर्वाचन अर्जी संख्या-3 शीर्षक "लै० कर्नल (सेवानिवृत्त) दौलत सिंह नागाईक बनाम

श्री राकेश वर्मा" में हिमाचल प्रदेश उच्च न्यायालय स्थित शिमला, के तारीख 7 अक्टूबर, 2005 का निर्णय निहित है, को जनसाधारण की सूचना हेतु प्रकाशित किया जाता है।

आदेश से,
प्रेम कुमार,
मुख्य निर्वाचन अधिकारी,
हिमाचल प्रदेश।

भारत निर्वाचन आयोग
निर्वाचन सदन, अशोक रोड, नई दिल्ली-110001

तारीख 19 जनवरी, 2006
29 पौष, 1927 (शक)

अधिसूचना

सं० 82/हि०प्र०-वि०स०/(3-03)/05.— लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 106 के अनुसरण में निर्वाचन आयोग 2003 की निर्वाचन अर्जी संख्या 3 में शिमला स्थित हिमाचल प्रदेश उच्च न्यायालय के तारीख 7 अक्टूबर, 2005 के निर्णय को एतद्वारा प्रकाशित करता है।

ELECTION COMMISSION OF INDIA

Nirvachan Saden,
Ashoka Road,
New Delhi-110 001.

Dated 19th January, 2006
29 Pausa, 1927 (Saka)

NOTIFICATION

No. 82/HP-LA/(3/03)/05.— In pursuance of Section 106 of the Representation of People Act, 1951 (43 of 1951), the Election Commission hereby publishes judgment dated 7th October, 2005 of the High Court of Himachal Pradesh at Shimla in Election Petition No. 3 of 2003.

Election Petition No. 3 of 2003.

Reserved on : 3-6-2005

Date of decision : 7-10-2005

Lt. Col. (Retd.) Daulat Singh Nagaik

.. *Petitioner.**Versus*

Shri Rakesh Verma

.. *Respondent.**Coram :***The Hon'ble Mr. Justice K. C. Sood, J.****Whether approved for reporting ? yes.****For the Petitioner : Petitioner in person.****For the Respondent : Mr. Ajay Kumar, Advocate.**

K. C. SOOD, J.

General Elections to the State Assembly of Himachal Pradesh were held on February 26, 2003. Respondent Rakesh Verma, hereinafter referred to as the "returned candidate" was declared elected from 7-Theog Legislative Constituency. The petitioner, Lt. Col. (Retd.) Daulat Singh Nagaik, hereinafter referred to as the "defeated candidate" was one of the candidates from this Constituency on the symbol of "Himachal Vikas Congress". The returned candidate contested the election as an independent candidate. Result of the election was declared on March 1, 2003. The returned candidate was declared elected by a margin of 3359 votes from his nearest rival Rajinder Verma of the "Congress Party". The returned candidate polled 19869 votes. His nearest rival Rajinder Verma polled 16510 votes, whereas, the defeated candidate polled 1446 votes out of 42975 total valid votes polled and lost his security deposit.

The defeated candidate by this petition under Section 80 and 81 read with Section 100 and 123 of the Representation of People Act, 1951 hereinafter referred to as "the Act" challenges the election of the returned candidate. The election of the returned candidate is sought to be set aside and declared void on the grounds :

- (a) The returned candidate incurred expenditure more than authorized by law which is a corrupt practice within the meaning of Section 123 (6) read with Section 77 of the Act;

- (b) The supporters of the returned candidate on the date of polling threatened, beat up the Scheduled Castes Electors, prevented them to cast their vote in free and fair manner at Booth No. 7/101-Dhar which amounts to booth capturing and is a corrupt practice within the meaning of Section 123 (1) 'A' and 'B' of the Act.
- (c) Electors of Booth No.7/101-Dhar were forcibly made to vote in favour of Shri Rakesh Verma, the returned candidate;
- (d) Votes of dead persons, including Dhani Ram, who had expired long time back, were cast "through stooge of the respondent" the returned candidate;
- (e) Such acts amounts to booth capturing as defined under Section 135-A of the Act.
- (f) Incidents of booth capturing also occurred at Polling Booth 7/76-Bagri (Theog) as the supporters of the returned candidate caused undue influence on the Electors thus the returned candidate committed corrupt practice under Section 123 (2) of the Act.

In the written statement filed by the returned candidate, the allegations are controverted. Preliminary objections are taken to the effect :

- (a) the election petition is not in conformity with the provisions of Section 81 and 82 of the Act read with High Court Rules with respect to the trial of the election petitions;
- (b) the other candidates have not been arrayed as party to the petition and therefore, the petition is bad for non-joinder of necessary parties;
- (c) the election petition does not disclose any triable cause of action against the returned candidate;
- (d) the petition deserves to be rejected as the petitioner has not set forth full and complete particulars of the alleged corrupt practices including the date and place of the alleged corrupt practice;
- (e) the allegations of corrupt practices made by the petitioner are vague, general in nature, sweeping and wild, the allegations are not against the returned candidate and for this reason alone, the petition is liable to be rejected.

On merits, the allegations are controverted. It is denied that the returned candidate indulged in any corrupt practice within the meaning of Section 123 (6) read with Section 77 of the Act. It is denied that the returned candidate incurred expenditure more than authorized by law or indulged in any booth capturing either at Booth No. 7/101-Dhar or Booth no. 7/76-Bagri (Theog). It is denied that any elector was prevented by or on behalf of the returned candidate from exercising his franchise.

In the rejoinder, the allegations made in the petition are reasserted.

On the pleadings of the parties, the following issues were settled on August 27, 2003 :

1. Whether the respondent in his election incurred expenditure more than authorized by law, as alleged and thereby committed corrupt practice within the meaning of Section 123 (6) read with Section 77 of the Representation of the People Act ? OPR.
2. Whether the respondent is guilty of threatening and beating the Scheduled Castes electors and preventing them from casting their vote in free and fair manner at Both No. 7/101 (Dhar) as alleged ? If so, its effect ? OPR.
3. Whether the petition filed by the petitioner does not comply with the provisions of Section 81 and 82 of the Representation of People Act, as alleged ? OPR.
4. Whether the petition is bad for non-joinder of necessary parties, as alleged ? OPR.
5. Whether the petition does not disclose any cause of action against the respondent ? OPR.
6. Whether the petitioner has not given, in the petition, full and complete particulars of the alleged corrupt practice by not disclosing names of the parties, who are alleged to have committed such corrupt practice, the date and place of such practice. If so, its effect ? OPR.
7. Relief.

Issue No. 2 was recast on January 7, 2004 at the request of the defeated candidate in following terms :

2. Whether supporters of the respondent threatened and beat up the scheduled caste electors and prevented them from casting their vote in free and fair

manner at Booth No. 7/101 (Dhar) and whether respondent is guilty of Booth capturing at Bagri (Theog), if so its effect ?
OPP.

Heard the petitioner, the defeated candidate and Mr. Ajay Kumar, Advocate, learned counsel for the respondent. The petitioner has also filed written submissions and synopsis which have been taken on record.

My findings on the issues are :

Issue no. 1.

Section 123 of the Act defines the corrupt practices. Section 123 (6) relevant for the purpose of this issue reads :

"123. Corrupt practices.— The following shall be deemed to be corrupt practices for the purposes of this Act :—

- (1) xxxxxx
- (2) xxxxxx
- (3) xxxxxx
- (4) xxxxxx
- (5) xxxxxx

(6) The incurring or authorizing of expenditure in contravention of section 77".

Section 77 provides that every candidate at an election shall, either by himself or by his election agent, keep a separate and corrent account of all expenditure in connection with the election incurred or authorized by him or by his election agent between the date on which he has been nominated and the date of declaration of the result thereof, both dates inclusive. Explanation to Seciton 77 provides that any expenditure incurred or authorized in connection with the election of a candidate by a political party or by any other association or body of persons or by any individual (other than the candidate or his election agent) shall not be deemed to be expenditure in connection with the election incurred or authorized by the candidate or by his election agent for the purpose of this Section. Explanation (1) reads :

- "1. Notwithstanding any judgment, order or decision of any Court to the contrary, any expenditure incurred or authorized in connection with the election of a candidate by a political party or by any other association or body of persons or by any individual (other than the candidate or his

election agent) shall not be deemed to be, and shall not ever be deemed to have been, expenditure in connection with the election incurred or authorized by the candidate or by his election agent for the purposes of this sub-section :

Provided that nothing contained in this Explanation shall affect :—

- (a) any judgment, order or decision of the Supreme Court whereby the election of a candidate to the House of the People or to the Legislative Assembly of a State has been declared void or set aside before the commencement of the Representation of the People (Amendment) Ordinance, 1974;
- (b) any judgment, order or decision of a High Court whereby the election of any candidate has been declared void or set aside before the commencement of the said Ordinance if no appeal has been preferred to the Supreme Court against such judgment, order or decision of the High Court before such commencement and the period of limitation for filing such appeal has expired before such commencement".

Sub-section (2) of Section 77 stipulates that the accounts maintained by a candidate shall contain such particulars, as may be prescribed and sub-section (3) mandates that total of the expenditure shall not exceed such amount as may be prescribed.

The allegation of the petitioner so far incurring of the expenditure, by the returned candidate, more than authorized by law is :

"To be precise, the respondent has on 7-2-2003 filed nomination and expenditure incurred on this single day was more than five lakhs by way of hiring of around 100 vehicles for rallying the crowd at Theog and serving food and drinks to the rallyist in his support running in the number of about 10000-12000. Complaint with regard to this with full particulars of the vehicles was sent to the Chief Electoral Officer of Himachal Pradesh through registered letter by the office bearer of Himachal Vikas Congress, i.e. Sh. Karam Singh and Sh. Chet Ram, the Executive President and Vice-President of Theog Mandal of the Party, as per the Annexure P-1 annexed to this petition. It is pertinent to submit herewith that total numbers of vehicles were much more than the 100 vehicles, whose registration numbers were noted and furnished to the Chief Electoral Officer, Himachal Pradesh. During entire period of election, there has been vulgar display of money by hiring large numbers of vehicles on later dates as well. The crowd gathered by the respondent in the vehicles was

so immense that the same was reported in the newspapers Divya Himachal (Annexure P-1/A) and Ajit Samachar (Annexure P-1/B). It is pertinent to submit herewith that the expenditure incurred on the day of nomination alone exceeds the prescribed expenditure, i.e., Rs. 4.0 lakhs".

It is the further allegation of the defeated candidate that the returned candidate while furnishing his account to the Returning Officer purposely concealed "these facts and has thus furnished wrong and insufficient account and thus incurred further disqualification as per the Rule 86 and 90 of the Conduct of Election Rules, 1961".

The returned candidate not only maintained and furnished false accounts but also gave false affidavits to the effect before the District Election Officer and, therefore, committed the corrupt practices within the meaning of Section 123 (6) of the Act.

The returned candidate in his reply deny and rebut these allegations. He denies that he incurred any expenditure on February 7, 2003 either to hire 100 vehicles as alleged for rallying crowd on that date or provided any food or drink to the crowd which had collected on the day he filed his nomination papers. According to him :

"As a matter of fact a sizeable number of well wishers and supporters of the defendant from various segments of the assembly constituency from various Panchayats or Mahila Mandals and Yuvak Mandals had come of their own volition at their own expenses to give moral support to the defendant and also to exhibit their support to the candidature of the Defendant. Defendant has no knowledge about the alleged complaint of having been made to the Chief Electoral Officer by the Office-bearers of the Himachal Vikas Congress Party. It is denied that the Defendant had collected any crowd. All people had come voluntarily at their own expense. The averments made in Annexure-P1 are totally wrong and false and as such denied by the Defendant. There is no date given on Annexure-P1 as to when it was written nor any proof of its dispatch or delivery has been annexed with the petition. Otherwise also the contents of the said Annexure-P1 are denied being unfounded and false. None of the vehicles mentioned in the said annexure were hired by the defendant or his agent on 07-02-2003. It is pertinent to mention here that the Respondent has been active in public life for the past 10 years and has fought three successive elections from Theog constituency in 1993, 1998 and won twice in 1993 and 2003. As such the defendant has a large following and mass base in his constituency and has been deeply involved in social and developmental activities in his constituency. It is also denied that the defendant has furnished or maintained wrong accounts and filed false affidavit in this behalf before the District Election Officer. It is also denied that the election of the defendant is

void or that the defendant committed any corrupt practices as falsely alleged in this para of the petition".

It is now well settled that allegations of corrupt practice against a returned candidate must be proved by clear, cogent and satisfactory evidence as in criminal or quasi-criminal proceedings. The burden is heavy on a person who questions an election on the ground of corrupt practices. The corrupt practice has to be proved beyond reasonable doubt as in criminal trials. In case of doubt as to the commission of corrupt practice, the benefit must go to the elected candidate. As far back in 1975, the Supreme Court in *Rahim Khan v. Khurshid Ahmed and others*, AIR 1975 Supreme Court 290 ruled :

"....An election once held is not to be lightly set aside unless clear and cogent testimony compelling the Court to uphold the corrupt practice alleged against the returned candidate is adduced. Election petitions where corrupt practices are imputed must be regarded as proceedings of a quasi-criminal nature wherein strict proof is necessary. The burden is therefore heavy on him who assails an election which has been concluded".

The rule was reiterated in *Lakshmi Raman Acharya v. Chandan Singh and others*, AIR 1977 Supreme Court, 587, *Amolak Chand Chhazad v. Bhagwandas Arya (Dead)* and another, AIR 1977 Supreme Court 813, AIR 1984 Supreme Court 960, *Surinder Singh v. Hardial Singh and others*, AIR 1985 Supreme Court 89, *Thakur Sen Negi vs. Dev Raj Negi*, AIR 1994 Supreme Court 2526, *R. P. Moidutty vs. P. T. Kunju Mohammad* (2000) 1 SCC 481, *Mahant Shreo Nath v. Choudhry Ranvir Singh*, 1970 (3) SCC 647, *Manphul Singh vs. Surinder Singh* 1973 (2) 2 SCC 599, *Birchandra Barman v. Shri Anil Sarkar and others*, (1976) 3, SCC 88, *Amolakchand Chhazad v. Bhagwan Dass Arya and another*, (1977) 3 SCC 566.

The evidence of corrupt practice allegedly committed by returned candidate or his agent(s) may now be scrutinized on the touchstone noticed above.

The allegation against the returned candidate is that he held a "Rally" on February 7, 2003, the day he filed nomination papers, and incurred expenditure of rupees 5 lakhs by hiring "around hundred vehicles" for transporting the crowd to Theog, served food and drinks to the crowd of about ten thousand to twelve thousands which had gathered in his support. The expenditure incurred by the returned candidate was more than rupees four or five lakhs. The other allegation is general in nature without any particulars that "there has been vulgar display of money by hiring large number of vehicles on later dates as well. The allegation lacks material facts and particulars.

In support of this allegation, the defeated candidate appearing as PW3 states that "there was gathering of 15000 persons for which 150 vehicles were deployed" though in the petition he alleged that about 100 vehicles were hired. The arrangement for public meeting including Shamiana, Light & Sound were made but the respondent did not show any expenditure towards it. Respondent also served food and drinks in the rally.

It is his evidence that one of the workers of HVC, namely, Karam Singh was charged with the duty to keep an eye on the rally and "note down the numbers of the vehicles which were deployed in the rally". According to the defeated candidate, the registered numbers of those vehicles were sent to the Chief Electoral Officer, Himachal Pradesh by a registered letter and news was also published to this effect in Divya Himachal and Ajit Samachar. He goes on to say that the expenditure incurred by the respondent for this rally was more than rupees 4,00,000/- on the very day itself. This amount was not reflected by the returned candidate in the return submitted by him to the Election Commissioner.

In cross-examination, he admits that he reached the Potato ground, where the alleged public meeting was held by the returned candidate, when the meeting was about to conclude. He further admits, "I did not see myself but I saw the crowd coming out of the rally. I did not go to the Potato ground myself. I have no idea that how many Shamianas and loud speakers were installed at the place of rally. I did not see personally any Shamiana and loud speaker in the Potato ground on that day as I did not go there. I do not know if there is any place at Theog from where the Shamianas could be hired. I did not file any complaint to any authority regarding the rally organized by the respondent on 7-2-2003". He further admits that he did not either meet the returned candidate or saw him on that day. He also admits that he did not enquire from any person as to when the returned candidate came in the rally on that day though he saw number of people taking food in the rally. Such food was being taken by number of people near the Potato ground at about 3 to 3.30 P.M. He could not name any person who might have served food to those persons. He further admits that he did not enquire as to who cooked the food or from where the food was brought or who served the food. He goes on to admit, "I did not enquire as to who cooked the food. I did not enquire as to where the food was cooked or who served the food. I did not see the responderit any where in the ground or where the people were taking food down below. Karam Singh, party worker of the petitioner, was present for the whole day in Theog. I had deputed him to note down the registration number of the vehicles deployed by the respondent. He did not inform me about the vehicles, number of the people taking food or number of Shamianas and tents". He also admits that he had not obtained record from the HRTC about the hiring of the vehicles by the returned candidate. He also admits that he did not himself see any record which might show that the returned candidate had

hired the vehicles on that day though clarifies that the returned candidate hired the vehicles in "Benami".

It may be noticed that he does not say in his petition that the vehicles were hired by the returned candidate "Benami". Admitting this fact, he says, "I did not mention that the vehicles were hired by the respondent benami in my election petition. The facts which are deposed today and on the earlier day were in my knowledge when I filed the Election Petition".

Now so far evidence of the defeated candidate regarding the hiring of the vehicles and incurring expenditure by the returned candidate for hiring vehicles and holding rally on the date of nomination is concerned, it is based on imagination or hear say. He admittedly has no personal knowledge about the hiring of the vehicles or about the food which was allegedly served by the returned candidate or about any expenditure which may have been incurred by the returned candidate or his election agent or by any other person with the authorization of the returned candidate or his election agent.

The petition lacks in material facts so far the hiring of the vehicles is concerned. In the petition, his allegation is that hundred vehicles were hired by the returned candidate on the date he filed nominations and spent more than rupees five lakhs on that date. He improved in his evidence to say that the vehicles were hired "Benami" whereas, such allegation is not made in the election petition. Though he admits, "the facts which are deposed today and on the earlier day were in my knowledge when I filed the election petition". Thus by the own version of the defeated candidate he was aware at the time of filing the election petition, that the returned candidate hired hundred vehicles to ferry the crowd in the name of other persons, yet, the defeated candidate does not make such an allegation in the petition which shows the hollowness of the allegation. This clearly indicates that the allegation is an after thought and improvement made after the filing of the petition and without any foundation.

The other evidence on which the petitioner rely is the evidence of Bhagat Ram (PW 4), Sohan Singh (PW 5), Sandeep Verma (PW 6), Ramesh Heta (PW 7), Sunder Lal Verma (PW 8), Karam Singh (PW 9), Manohar Lal Sharma (PW 16), Kanshi Ram Sangta (PW 18), Sadh Ram Jharaik (PW 19), Mohan Chauhan (PW 20) and Charan Singh (PW 22).

Bhagat Ram (PW4) says that he was present in Theog on February 7, 2003 when the returned candidate filed his nomination papers. It is his evidence that on that day, there were about 300 vehicles which include buses, trucks, taxis and cars. According to him 14000 to 15000 people had collected in Theog on that day. Some of the people collected near the Courts, whereas, other remained in Potato ground.

Some speeches were made in the Potato ground and food packets were distributed. The meeting continued till about 4.00 P. M. and for this, the returned candidate "*should have made expenditure for this rally and food packets*". According to him, no liquor was distributed in the rally but the crowd was shouting slogans. The matter was reported in the newspaper. It is his evidence that this rally was covered by photographers and videographers. In his cross-examination he says that he was President of Theog Mandal of B.J.P. and, therefore, he was coming to Theog daily from his village. He says that he did not visit the Courts but he did go to Potato ground and stayed there for about two and half to three hours. According to this witness, on that day Ajay Sham, Madhu, Prithvi Raj etc. gave speeches. He admits that neither he nor any of his party workers filed any complaint regarding the distribution of the food packets on the date of the filing of the nomination papers by the defeated candidate. He expressed his inability to give name of any person who received the food packets on the date of nomination from a truck. It is his evidence that food packets were thrown in the Potato ground. He is unable to give the registration number of the truck which carried food packets. The rally, says this witness, concluded at 4.30 P.M.

There is nothing in the evidence of this witness which may show even remotely that the returned candidate incurred any expenditure either for collecting the crowd on the date of filing of his nominations or for the food packets which were allegedly distributed. In fact, his statement that food packets were distributed does not inspire confidence. He is unable to give name of a single person who might have received food packet though he claims to be present in the potato ground and is an active political worker of the Bhartiya Janta Party. Had any food packets been distributed by the returned candidate, surely this witness who is a former President of the Bhartiya Janta Party and is an active political worker of the B.J.P. would have known few names of the persons who received packets and would have made enquiries as to who distributed those food packets and from where they came from and lodged complaint with the District Election Officer, Chief Election Officer or any other authority as their own candidate was also in the field. What he says is that the food packets were thrown into the ground from a truck. He, as noticed earlier, is unable to give registration number of the truck. Had such packets been thrown from the vehicle which was noticed by this witness, he definitely would have noted the registration number of the truck and also would have naturally tried to find out the identity of the owner of the truck or who hired that truck or on whose behalf, those food packets were being distributed. He also is candid in saying that food packets were distributed after the conclusion of the rally, *i.e.* between 4.30 to 5.00 P.M. whereas, the rally concluded and terminated at 4.30 P.M.

The evidence of this witness is evasive, bereft of material facts and therefore is neither acceptable nor inspires any confidence.

In order to prove corrupt practice, as noticed earlier, the excess expenditure must be proved to be incurred either with the consent or under the authority of the returned candidate or his election agent. Certainly amount of expenditure which is not authorized by the candidate or his election agent is not corrupt practice. (See: *Rananjaya Singh v. Baijnath Singh and others*, AIR 1954 SC 749). There is nothing in the evidence of this witness even to suggest remotely that any expenditure was incurred by the returned candidate or his authorized agent or under their authorization on that day.

To a similar effect is the evidence of Sohan Lal (PW5) who says that there were hundred buses and about 200-300 small vehicles and crowd of thirteen thousand to fourteen thousand had collected in the rally which was held in the potato ground. He says that Mikes were installed and sitting arrangements made in the potato ground on the date of filing of the nomination. He also says that one vehicle with food packets which was 'Swaraj Mazda' came and threw the food packets into the potato ground and posters of the returned candidate were pasted on the vehicle. The rally was held after the nomination papers were filed by the returned candidate. In cross-examination, he admits that his father was election agent of the defeated candidate. The demeanor of the witness was noticed to the effect he was evading answers in the cross-examination. It is his evidence that food packets were distributed at 2.00 P.M. whereas according to the other witnesses, as noticed earlier, the food packets were thrown in the ground at 4.30 P.M. He admits that he lives with his father at Theog. There is nothing in the evidence of this witness to suggest that crowd collected at Theog on the efforts made by the returned candidate or his election agent or under their authorization. Merely because large crowd collected in the support of the returned candidate on the date, he filed his nomination, would not suggest that crowd collected at his asking or he spent money for that.

The witness admits to be under-trial in five criminal cases at Theog. he also says that about one thousand chairs were placed in the potato ground though he is silent about the fact as to who and from where these chairs were brought. Again from the evidence of this witness there is nothing to infer that any expenditure was incurred by the returned candidate or his election agent or any other person under the authority of the returned candidate. There is also nothing in his evidence to show that either the returned candidate or his election agent or any other person authorized by any of them was responsible for transporting the crowd. To a similar effect is the evidence of other witnesses. In fact from the evidence of none of the witnesses it can be inferred that any expenditure came from the pocket of the returned candidate either in bringing the crowd to Theog or in addressing such crowd.

It may be noticed that the case of the returned candidate is that he had not hired any bus or vehicle on the day he filed his nomination papers, i.e. February 7,

2003. It is his evidence that he did hire one jeep number of which is given in his return which was a Taxi. He says in his evidence, appearing as RW 5, that he did not pay any hire charges regarding any other vehicle, except a taxi, on that date. According to him, on the date of filing of the nomination, there were about 25-30 buses and 25 to 30 small vehicles. His supporters had come in these vehicles and they had brought the vehicles themselves at their own expenses. It is his further evidence that a large crowd had gathered which was more than expectations. About 3000 people had gathered spontaneously when he came to the potato ground in procession. He says that three other persons also addressed the crowd gathered and thereafter crowd dispersed and all of them left for their respective houses. Neither he nor any of his supporters provided any food or drinks or liquor to any of the persons on that date. He further says that no Shaminana was erected in the ground when he addressed the people as the crowd had gathered spontaneously. People dispersed about 3.00 P.M. as it was winter day and the day being small, people liked to return to their houses early. He states in cross-examination that he had not asked any of the supporters to come or to bring people or hire vehicles.

It is the evidence of the petitioner that he asked Karam Singh (PW 9) to note down the number of the vehicles. Karam Singh appearing as PW 9 says that a crowd of about 15000 to 16000 people had collected at Theog on the date of filing of the nomination papers by the returned candidate. A letter, according to him, was sent to the Election Commissioner by him complaining about the vehicles present on that day. He also says that food packets were taken out from two parked vehicles, i.e. Swaraj Mazda. In cross-examination he says that the numbers of the vehicles present given in Exhibit PW 9/A were noted down both by him and Chet Ram on separate papers. Those papers have not been produced on the record. He also admits that they did not make any enquiry from the Drivers or other persons as to who owns the vehicles, from where these vehicles came or who hired those buses or vehicles. This evidence of Karam Singh on which the defeated candidate heavily relies is of no assistance. It is the case of the defeated candidate that he had asked Karam Singh to take down the numbers of all the vehicles yet he says that he did not take down the number of the vehicles from which the food packets were distributed. He also says that he did not lodge any complaint so far the distribution of the food packets on that date is concerned. The allegation of distribution of food packets, as noticed earlier, is only after thought. There is no foundation in the election petition about the distribution of the food packets by or on behalf of the returned candidate.

Tarlochan Sharma (RW 9) was the Station House Officer, Police Station, Theog at the relevant time. It is his evidence that he was present at the time of filing of the nomination by the returned candidate. The returned candidate had come in procession to file his nomination papers and there were about 2500 persons in the procession. When the procession returned back from the office of the Assistant Returning Officer,

a meeting took place at Potato ground. The meeting dispersed at about 3.00 or 3.30 P.M. He was accompanied by his subordinate staff. It is his evidence that on that date, neither food nor liquor was distributed to any person by the returned candidate or his workers. He is categorical in his evidence that on that date, a large crowd had collected near S.D.M. office when the returned candidate went to file nomination papers and returned candidate started speaking to the crowd. He objected to it and asked the returned candidate not to hold the meeting at that place and they should go to potato ground for this purpose. The crowd came to the potato ground and three-four persons gave speeches. He stated that, *"there was no loud speaker installed at the potato ground"*. This witness is a police officer and there is no reason to disbelieve him.

The defeated candidate heavily rely on a letter written by Madan Lal Verma, B.D.C. Chairman Theog whereby he had requested the Regional Manager, HRTC Taradevi for 28 buses for February 7, 2003 in the morning at 5.00 P.M. The names of the places where buses were required had already been given to the Regional Manager. There is a demand note for the deposit of rupees 95006/- on this application for hiring of special buses in favour of BDC Chairman. On the reverse, the names of the persons, ten in number, are given who hired the buses and paid the hire charges. On record is a copy of receipt (Exhibit PW 2/B-1) for rupees 22,377/- in the name of Madan Lal Verma for hiring of three special buses. The receipt is dated February 4, 2003. There is another copy of receipt Exhibit PW 2/B-2 for rupees 18296-- in the name of one Prithvi Raj Cheog for three special buses. Exhibit PW 2/B-3 is a copy of receipt for rupees 7258/- for the hire of three special buses in the name of Pardeep Jhangta. PB 2/B-4 is a copy of receipt for rupees 6099/- in the name of Narain Singh Chauhan for the hire of two special buses. Exhibit PW 2/B-5 is a copy of receipt for rupees 9878/- in the name of Pratap Chauhan for hire of three special buses. Exhibit PW 2/B-6 is a copy of receipt for rupees 8165/- in the name of Daulat Ram for hire of two special buses. Exhibit PW 2/B-7 is a copy of receipt for rupees 3528/- in the name of Deep Ram for hire of two special buses. Exhibit PW 2/B-8 is a copy of receipt for rupees 4637/- in the name of Raju Pradhan for hire of two special buses. Exhibit PW 2/B-9 is a copy of receipt for rupees 2268/- in the name of Shyam Lal for hire of a special bus. PW 2/B-10 is a copy of receipt for rupees 10282/- in the name of Durga Singh for hire of one special bus. Exhibit PW 2/B-11 is a copy of receipt for rupees 2278/- in the name of Shyam Lal for hire of one special bus.

Khiali Ram, Traffic Manager, HRTC Taradevi (PW 2) proved these receipts. He had brought the summoned record and the details of the buses which were demanded by Shri Madan Lal Verma, Chairman, BDC. It is his evidence that 28 buses were demanded. The amount for hiring the buses was deposited by ten persons named on the back of the application Exhibit PW 2/A. The copies of receipts issued to these persons are Exhibit PW 2/B-1 to PW 2/B-11. PW 2/D is the original summary by which the buses were allotted to various persons and the amount received from

each one of them. This evidence shows that these buses were hired by Madan Lal Verma, Prithavi Raj Cheog, Pardeep Jhangta, Narain Singh Chauhan, Partap Chauhan, Daulat Ram, Deep Ram, Raju Pradhan, Shyam Lal, Durga Singh and another Shyam Lal. Exhibit PW 2/C is the copy of the office order whereby 28 buses were detailed for February 7, 2003 in the name of persons noticed above.

Madan Lal, Chairman of the Panchayat Samiti Theog, who wrote to the Manager, HRTC. for hiring the buses, is supporter of the returned candidate. Appearing as RW-10 he states that he is in active politics since 1990 and had also been President of Kaleend Panchayat. It is his evidence that he supported the returned candidate in his elections in the year 1993 and 1998 also. He says that on February 7, 2003, the date when the returned candidate filed his nomination papers, some buses had come to Theog. In his estimation, about 30 to 35 buses had come on that day. He says that he had also booked some buses but does not know the number of the buses. The charges for the buses, says this witness, were paid by him and other supporters of the returned candidate. He proves application Exhibit PW 2/A which he made to the Regional Manager, HRTC Taradevi on behalf of the named persons. It is his evidence that charges for the buses were paid by the persons named on the reverse of the application. He denies that he deposited the entire amount of rupees 95006/- and this amount was collected from other persons. He says that he paid rupees 22000/- and few hundred from his pocket. He admits that he is an income tax assessee but has not filed his income tax return for the year in question and that he will show this expenditure incurred by him in hiring the buses in his return. He explains that he did not show this expenditure in the income tax return for the financial year which was closed on 31-3-2003. In cross-examination he says that people had collected at Potato ground after filing of the nomination papers by the returned candidate. No mike was installed in the potato ground. He was one of the speakers and addressed public meeting. He denies the suggestion that food packets were distributed on that date. Similarly Prithvi Raj (RW11) says that he had been the President of Gram Panchayat Cheog and he is also President of Truck Operators Union of Theog and Chairman of the Farmers Advisory Committee, Theog. He is associated with the returned candidate and had arranged three buses on the date when the nomination papers were filed by the returned candidate. The money for this purpose was collected from the people on the date of filing of the nomination papers. This witness had paid rupees 18296/- towards the hiring of three buses. In cross-examination he says that the money was collected by the people who wanted to go to Theog in support of the returned candidate to watch the filing of the nomination papers by him of their own and not because of the reason that financial health of the returned candidate was weak or at his best. He qualifies that he had collected about rupees 19000/- out of which rupees 700/- were returned. He also says that he had authorized RW-10 Madan Lal Verma to hire the buses from the HRTC. There is nothing in the cross-examination of this witness which may either dent his evidence or make his evidence un-acceptable or otherwise infirm.

Similarly, Pardeep Kumar (RW-12), Vice President of Gram Panchayat Ghund says that the people of his Panchayat had wanted to go to Theog on the date of filing of nomination papers by the returned candidate in his support and for that purpose, the people of the illaqua had arranged for three buses. The money for hiring these buses was spent by the people of the illaqua. There is nothing in the cross-examination which may show that this expenditure was either incurred by the returned candidate or his election agent or by persons authorized by him or at his asking.

Partap Singh (RW13) is President of Gram Panchayat Teothi, the Panchayat of the defeated candidate. He is also associated with the returned candidate since 1993. It is his evidence that the people of the illaqua approached him for going to Theog on the date of filing of the nomination by the returned candidate and asked him to arrange for buses. He, therefore along with other persons arranged for three buses and the people contributed about the hiring of these three buses. The returned candidate did not give any money for hiring the buses. He says that they had authorized Madan Lal, BDC Chairman to book the buses on their behalf. There is nothing in the cross examination which may put a question mark on his veracity.

Sandeep Verma (PW 6), the witness of the defeated candidate, speaks about the distribution of the food packets and having taken the photographs of the rally. He says that on the date of filing of nomination papers by the returned candidate, several persons had collected in the morning and all of them went in procession towards the Court complex and thereafter they returned back and collected in the potato ground. Food packets were distributed. In his estimation, 150 vehicles including heavy vehicles were present in Theog Town and a crowd of about 15000 to 16000 had collected. He took the photographs of the rally which are Exhibit PW-6/A/1 to PW-6/A/13.

Now photograh Exhibit PW-6/A/1 shows that some thing is being taken out from a truck. PW-6/A/2 shows the returned candidate sitting over some vehicle alongwith other persons. Exhibit PW-6/A/4 shows a crowd in a procession. To a similar effect are the photographs Exhibits PW-6/A/6, PW-6/A/7, PW-6/A/8, PW-6/A/9, PW-6/A/10, PW-6/A/11 and PW-6/A/12. There is nothing in the photograhps to show when and where these photographs were taken. These photographs do not take the case of defeated candidate any further.

In cross-examination this witness says that he is a Post Graduate in History from Himachal Pradesh University having done his M.B.A. from IGNOU. In 2003, he was not working any where when the elections were held. He is an agriculturist by proiession. He says that when the respondent returned back, after filing of the nomination papers to the pota' ground at about 1.30 in the afternoon, rally continued upto 3.30 P.M. or 4.00 P.M. He says that he did not go to potato ground on that date.

The evidence of this witness regarding the collection of the crowd at potato ground is based on hear say and is of no assistance to the case of the defeated candidate. He took the photographs with the Kodak Box Camera. He is not aware about the strength of the lens of the camera. He says that his camera is fixed lens camera. He is unable to explain the reasons for taking the photographs of the rally. He is unable to say from where he purchased the roll of the camera which he used on February 7, 2003, the date of filing of the nomination papers by the returned candidate. He says that the food packets were distributed at 3.30 or 4.00 P.M. and the distribution was over by 4.00 P.M. He is not aware who distributed the food packets. He says that there was a truck from which food packets were thrown to the ground. Though he took photograph of this truck but is not aware about the number of the truck. He admits being an activist of Student Federation of India. He is facing criminal cases at Theog in connection with agitation in the College. He admits that when he said that there were 150 vehicles on the date of nomination, he did not note down the number of any vehicle any where nor he knows the number of any of the vehicle. Then says, *"there were five or six vehicles on the date on which the respondent filed his nomination"*. To a Court question he says, *"I cannot give any reason why did I take these photographs. I handed over these photographs to the petitioner because of his friendship. I might have got these photographs developed within one month or two months"*.

The evidence of this witness also does not remotely show that any money was expended by the returned candidate or the election agent or any of his supporters at his asking or under his authorization. Merely because a crowd collected, converted into rally which was addressed by the returned candidate and two or three of his supporters does not suggest that such rally was organized by the returned candidate or his election agent or his supporters under his authorization. It is not uncommon in our democracy that large number of supporter gather and accompany a candidate to the office of the Returning Officer to file nomination papers and such gatherings are also addressed by the candidate and other supporters. Merely because a crowd assembles at the time of filing of the nomination by a returned candidate in election would not suggest that such crowd is gathered at the instance of any such candidate or such candidate spent money from his pocket for ferrying the crowd without any other supporting evidence. It is important to note that none of the witnesses of the defeated candidate says that expenditure was incurred either by the returned candidate or his election agent or his supporter under his authorization nor is there any other evidence on record which may even remotely suggest that any expenditure was incurred by the returned candidate or his election agent or any other person authorized by the returned candidate or his election agent on the date of filing of the nomination. On the contrary evidence shows that large number of people gathered of their own volition and expenditure for travel was incurred by the supporters or the people who gathered at Theog.

Ramesh Heta (PW-7) was the General Secretary of the Theog Mandal Congress. It is his evidence that a crowd of about 14000 to 15000 people had collected on February 7, 2003 when the returned candidate filed his nomination papers. According to him, there were about 100 or 150 small vehicles. *"The crowd went towards the Court in rally. Thereafter a rally was held in the Potato Ground"*. According to him, he saw tents fixed in the Potato ground. The chairs were also placed. There were arrangement for public address system and about six or seven persons gave speeches. The rally concluded at about 3.00 or 3.30 P.M. He says there were several photographers and Video were also taken. It may be noticed that no photograph other than noticed earlier or any video cassettes has been either relied upon or produced in the Court. He then goes on to say that people were taking liquor near the bus stand in a vacant space. He goes on to say that food and liquor might have been distributed by the returned candidate. This witness is unworthy of any credit.

Firstly the defeated candidate is categorical that food was served in the potato ground itself but this witness says that no food and liquor were distributed to the people by the candidate, i.e. the returned candidate near the bus stand in a vacant place. So far the question of distribution of liquor or food is concerned, his testimony is that the people were taking food and such food or liquor *might have been served by the returned candidate*. Therefore the statement of this witness is of no assistance to the defeated candidate.

Ramesh Heta (PW-7) would have us believe that the liquor and food was distributed on February 7, 2003 at a place which is only 300 to 400 mtrs. away from the Police Station. To believe him is to believe incredible. Surely if this was true, either the defeated candidate or this witness or any other worker of the defeated candidate would have reported the matter with the Police Station at least about the people taking the liquor at a public place. When asked, this witness was unable to give name of any person who participated either in the rally or partook the food or got food packets. He admits that his party did not report to the Election Commission or any other authority regarding the distribution of the food packets or the liquor. He does not explain why complaint was not lodged. It would have been only natural for a leader of any political party opposed to a candidate who indulged in distributing food packets or distribution of liquor to report the matter to the Election Commission of India or any authority under him or to the Police Station particularly when the Police Station was only 300 mtrs. away from that place.

The then Deputy Superintendent of Police Gurdev Singh appearing as RW-6 states that he was in the town on the date when the returned candidate filed his nomination papers for Theog Constituency. It is his evidence that he did not see any procession of the returned candidate on that day. In cross-examination he says that though he was not on the spot but according to the report of the Station House Officer,

about 2000 to 2500 people had collected on the date of filing of the nomination by the returned candidate. There is no reason to disbelieve the evidence of the Deputy Superintendent of Police or the Station House Officer. They are independent witnesses without any political affiliation.

The entire evidence led by the defeated candidate being nebulous in nature is unworthy of reliance to return the finding that the returned candidate or his election agent or any other person under the authority of the returned candidate or his election agent spent any money either for the convenience of the crowd which had collected at Theog or for the distribution of any food or liquor.

It hardly needs any emphasis that the burden of proof regarding excess expenditure is always on the person who challenges the election. A reading of Sections 123 (6) and 77 of the Act shows that in order to constitute a corrupt practice, the excessive expenditure must be proved to be incurred or authorized by the candidate or his election agent. An expenditure incurred by a third person who is not authorized to do so either by the candidate or his election agent is not a corrupt practice.

In *Ramanjaya Singh v. Bed Nath Singh and others* AIR 1954 SC 749 the paid employees of the father of the candidate worked at the election of that candidate. The employees, it was held by the Apex Court, were mere 'volunteers' so far the candidate is concerned and the payment to them by his father could not be taken into account and consequently no corrupt practice is committed.

The Apex Court in *Magras Patadia v. R. K. Birla and others*, AIR 1971 SC 1295 relying upon *Rananjaya Singh v. Baijnath Singh and others*, AIR 1954 SC 749, *Mubarak Mazdoor v. Lal Bahadur* (1958) 20 ELR 176, AIR 1970 SC 110 observed that to prove the corrupt practices of incurring expenditure beyond the prescribed limit, it is not sufficient for the petitioner to prove merely that expenditure of more than the prescribed limit had been incurred in connection with the election, he must go further and prove that the excess expenditure was incurred with the consent or under the authority of the returned candidate or his election agent.

The Apex Court in Dhartipakar Aggarwal v. Rajiv Gandhi, AIR 1987 SC 1577 ruled that in order to constitute corrupt practices as contemplated under Section 77 and 123 (6) it is necessary to plead requisite facts showing authorization or undertaking or reimbursement by the candidate or his election agent. Incurring or authorizing expenditure beyond the prescribed limits is not established from the mere allegation that several jeeps carrying party flags were plying in the constituency and that food was given to party workers.

In Gajanan Krishnaji Bapat v. Dattaji Raghobaji Meghe (1995) 5 SCC 347, their Lordships interpreting the provisions of Section 123 (6) and 77 read with

Explanation-I to Section 77 of the Act held that it is for the petitioner to prove that the excess expenditure had been incurred or authorized by the candidate or his election agent. An expenditure incurred by a third person which is not authorized by the candidate or his election agent is not corrupt practice. Voluntary expenditure incurred by friends, relations or sympathizers of a candidate or candidate's political party is not required to be included in the candidate's return of expenses, unless the expenses were incurred in the circumstances from which it could be positively inferred that the successful candidate had undertaken that he would reimburse the party or the person who incurred the expenses. Their Lordships relying upon the observation of the Constitution Bench of the Supreme Court in *Dr. P. Nalla Thamphy Terah v. Union of India and others*, 1985 (Supp.) Supreme Court Cases 189 observed in paragraph 13:

"13. We have referred to this large data in order to show that the influence of big money on the election process is regarded universally as an evil of great magnitude. But then, the question which we, as Judges, have to consider is whether the provision contained in Explanation 1 suffers from any constitutional infirmity and, particularly, whether it violates Article 14. On that question we find it difficult, reluctantly though, to accept the contention that Explanation 1 offends against the right to equality. Under that provision, (i) a political party or (ii) any other association or body of persons or (iii) any individual, other than the candidate or his election agent, can incur expenses, without any limitation whatsoever, in connection with the election of a candidate. Such expenses are not deemed to be expenditure in connection with the election, incurred or authorized by the candidate or by his election agent for the purposes of Section 77 (1). It is urged that by reason of this provision, affluent political parties get an unequal and unfair advantage over those parties or associations which do not command the same money power and therefore, the guarantee of equality is violated. The answer to this contention is that Explanation 1 classifies all political parties or associations in one group and confers upon them the same or similar advantage. Political parties or, politically motivated associations or bodies of persons or, individuals interested in political happenings are characterized by common attributes, the dominant attribute being that they engage themselves in activities of a political nature. Elections constitute the core of such activities. A classification of this nature bears reasonable relationship with the object of the statute that expenses incurred by those who fall within the particular group should not be regarded as expenditure incurred or authorized by the candidate or his election agent. It is then no answer to say that all political parties are not equally situated in the wealth which they command. Where such an argument open, the limit set upon election expenses by Rule 90 shall also have to be regarded as violative of the guarantee of equality because, a fairly large number of contesting candidates, particularly the independents, would not be in a position to spend

as large an amount as rupees one lac, which is the permissible limit in large constituencies. Classification has to be broadly reasonable in order to sustain the challenge of unconstitutionality. One cannot dissect that process and discover shades within shades to nullify it on the ground of inequality. It is a stark fact of life that an independent who contests an election on his own, that is, without the support of a political party, is at a considerable disadvantage as compared with candidates supported by political parties. But, that does not violate the rule of equality. It is not the election law which creates such inequalities. Inequalities exist apart from that law and are, unfortunately, implicit in the unequal positions in which the citizens find themselves. What the law does is to allow, in an equal measure, all political parties, associations or bodies of persons or individuals (other than the candidate or his election agent) to incur expenses in connection with the election of a candidate, which need not be included in the return of election expenses which the candidate is required to file".

(emphasis given).

There is not a word, not a whisper, either in the election petition or in the evidence which may remotely suggest that any money was spent for the transportation of the large crowd which had collected and was addressed by the returned candidate and few of his supporters, on the date of filing of nomination papers by the returned candidate, came out of the pocket of the returned candidate or of his election agent or was so authorized either by the returned candidate or his agent irrespective of the number of the crowd, the number of the vehicles.

Even though the returned candidate maintains that the photographs Exhibits PW-6/A/1 to PW-6/A/1 to PW-6/A/6 are not of the date of filing of his nomination but assuming these photographs to be of the day of filing of the nomination by the returned candidate, it is of no consequence and of no assistance to the defeated candidate. What at best these photographs show is that the returned candidate went in procession to file his nomination. These photographs, on which the defeated candidate lays great stress, do not by any stretch, show or suggest that any expenditure was incurred for the collection of crowd going in procession with the returned candidate to file his nomination papers. In any event, the evidence on record does not even suggest that any expenditure was incurred either by the returned candidate or by his election agent or authorized by the returned candidate or by his election agent in connection with gathering of the crowd, serving of the food or in addressing of the crowd by few persons including the returned candidate.

So far the allegation of the defeated candidate that the returned candidate incurred expenditure in organizing and addressing various rallies at various places during the period from February 7, 2003 till the date of the polling is concerned, there

is no evidence on record to suggest that any rallies were organized or addressed by the returned candidate during the period in question. The defeated candidate in his cross-examination admits that he does not have any account of the rallies held by the returned candidate during this period. He next says that he saw one rally held by the returned candidate at Mahori, another at Kyara and one at Sainj but he is unable to give the date and time when these rallies were held. The allegation even in the testimony is general in nature and not specific. No particulars of such rallies are given in his testimony. These allegations do not find mention in the petition and therefore, deserves not consideration. When the defeated candidate speaks about the rallies, he does not say that these rallies were held at the instance of the returned candidate or his election agent or any expenditure at all was made by any person. Though he says that his workers were with him when he saw these rallies but goes into selective amnesia and says that he is unable to name any worker who was with him when he saw the rallies at various places. No other witness of the defeated candidate speaks of any rally held by the returned candidate at Mouri, Kyara or Sainj.

The allegation of corrupt practices, as seen earlier, has to be proved by evidence which leaves no doubt as to the commission of corrupt practices. As pointed out by the Apex Court in *Boddepalli Rajagopala Rao v. N.G. Ranga*, AIR 1971 SC 267, a charge of corrupt practice must be established by clear and cogent evidence. It cannot be held to be established merely on suspicion or doubt and even on probability factor.

Though there is no foundation in pleadings but assuming for the sake of argument that food packets were distributed on the date of filing of the nomination by the returned candidate, then such distribution of the food packets would not ipse dixit lead to the conclusion that the food packets were distributed by the returned candidate or his election agent or any other person under the authority of the returned candidate or his election agent.

In *Komiroddy Ramuloo v. Chonnanmaneni Vidyasagar Rao and others* AIR 1990 Supreme Court 1352, one of the allegation was that the first respondent, distributed "Arrak" (liquor) amongst the voters with a view to win over the voters. The case set up was that Police seized the vehicle in which the liquor was carried and such vehicle was in the service of the returned candidate. It was the further case of the petitioner in that case that when the vehicle was seized by the Police, election material of the returned candidate was found in that vehicle though returned candidate was not named in the F.I.R. The workers of the returned candidate were permitted to escape from the vehicle. It was found that no complaint was lodged about this fact to the Election Observer. The evidence led by the petitioner in that case was found to be uninspiring and not reliable which was rejected and not relied upon.

The Supreme Court in *Lakshmi Raman v. Chandan Singh*, AIR 1977 SC 412 in applying the principle that allegations of corrupt practice must be proved beyond reasonable doubt, held that in an election petition, it is unsafe to accept oral evidence at its face value, without looking for some surer circumstances or unimpeachable documents (in proof of the alleged corrupt practice). In this case the returned candidate had led evidence to show that the crowd which collected on February 7, 2003, the date on which the returned candidate filed his nomination papers, came in buses which were hired by his sympathizers voluntary and, therefore, any expenditure incurred by such sympathizers or friends or relations voluntarily without any authorization or asking of the returned candidate or his election agent are not to be included in the expenses of the returned candidate unless the expenses are shown to have been incurred in the circumstances from which a reasonable inference can be drawn that the successful candidate had reimbursed such person or sympathizer (s) or friends (*See : Smt. Indira Nehru Gandhi v. Raj Narain* 1975 SC 2299, 2421).

The next contention of the defeated candidate is that the crowd having been brought by the returned candidate and collected at Theog on the date of filing of the nomination was reported in the newspapers "*Divya Himachal*" and "*Ajit Samachar*".

A news-item had appeared in the paper "*Ajit Samachar*" (Exhibit PW19/A) to the effect that unprecedented crowd had collected on the date of filing of the nomination by the returned candidate. It says that historical event was seen in Theog on the date the returned candidate filed his nomination papers. At about 7.00 A.M. people started coming from far off places on foot, in buses, and small taxis. All vehicles were full and this continued till about 11.00 A.M. which led to the situation where the returned candidate could not file his nomination papers at the auspicious time because the crowds were pouring in and during this time about 14000 people had collected and Police had a tough time to control the crowd and, therefore, even the traffic was jammed. People were such enthusiastic that the vehicle in which the returned candidate was going to file his nomination papers, had a flat tyre. On all directions, only crowds could be seen. There is nothing in the news-item from which it may be inferred that the crowd was collected either at the instance of the returned candidate or his agent or the charges for transportation of the crowd were paid by the returned candidate or his agent or any person authorized by the returned candidate or his election agent.

Sadh Ram Jharaik (PW-19) who authored the news-item states that this news item was sent by him and appeared in his paper "*Ajit Samachar*" on February 8, 2003. In cross-examination he says that he sent the news report by fax and did not retain any copy. He also says that the news reports sent to the Editor is some time edited, altered and changes are made at that editorial desk and he cannot say that any change was made at the editorial desk in respect of the report sent by him. He also says that

he cannot give any estimation of the crowd which had gathered at the time of filing of the nomination.

There is nothing in the news item which may suggest that crowd collection at Theog was at the instance of the returned candidate. On the contrary, the news item suggests that the crowd poured from all directions of their own.

This news item appearing in Ajit Samachar also does not take the case of the defeated candidate any further.

Mohan Chauhan (PW 20) is Journalist and co-respondent for "Divya Himachal" at Theog. It is his evidence that he had filed report regarding the nomination papers filed by the returned candidate which was published in the Daily issue of Divya Himachal on February 8, 2003 (Exhibit PW-20/A). The news-item (PW-20/A) merely says that the returned candidate filed his nomination papers along with thousands of his supporters and that the returned candidate addressed the crowd. On seeing thousands of people in the crowd, the supporters of the returned candidate became surer of the winning of the returned candidate and they feel that other candidates will loose their security deposits. There is nothing in this news-item which may indicate even by implication that any expenditure was incurred by the returned candidate either in the transportation of the crowd or for any food. The news report does not even speak about any food having been served. This witness, it may be noticed was shown photographs Exhibits PW-6/A/2, PW-6/A/6, PW-6/A/9, PW-6/A/10 and PW-6/A/13 to which he maintains that he is unable to say of which date these photographs pertain to. News items and photographs on which the defeated candidate heavily rely are of non assistance to the defeated candidate.

The next contention of the defeated candidate is that the returned candidate in his return of election expenses furnished to the District Election Officer did not show the expenditure incurred by his supporters, well wishers or friends for organizing rallies, cost of hiring the vehicles on the day of the nomination of the returned candidate and also the date on which the election results were declared. The expenditure statement submitted by the returned candidate does not even show the entire expenditure incurred on vehicles, chairs, mikes, shamianas, telephones, electricity and water bills etc., even though he incurred huge expenditure on these items. Therefore non-inclusion of the expenditure in he return shows that the returned candidate has incurred excess expenditure than authorized by law which would be a mischief within the meaning of Section 77 (1) and (2) amounting to corrupt practice and also corrupt practice under Section 123 (6) of the Act.

He also argues that the return has not been properly filled and the accounts have not been maintained properly as provided under Section 77 (1) of the Act. The

returned candidate having not maintained the true and correct account of the expenditure incurred by him had circumvented the provisions of law thereby committed corrupt practice under Section 77 (2) of the Act and rule 86 of the Conduct of Election Rules, 1961 ("Rules" for short). He specifically refers to page 4/1 of the return regarding the payment of the fuel in respect of vehicle No. HP-01-3400 and submits that in column No. 5 regarding the date of payment, the payment is shown to have been made on February 26, 2003 whereas, it is actually made on February 14, 2003 as is reflected in the cash memo and voucher No. 16. It appears in the original voucher, there is date of 24-2-2002 but it has been corrected to 14-2-2003. Other bills on this page are also of the same date, i.e. 14-2-2003. The argument of the defeated candidate is without foundation and is rejected.

He next points out at page 9/2, the rent of this vehicle is shown to have been paid on 20-2-2003 whereas, in fact, the rent was paid on 26-2-2003. In this case also there is an over-writing on the date. He also contends that certain columns in the registers have been left blank and, therefore, the account of expenditure is not correct which would lead to the presumption that the returned candidate incurred expenditure more than authorized by law.

Mr. Ajay Kumar, learned counsel for the returned candidate submits that there is no pleading about these material facts in the petition and, therefore, the grievance cannot be looked into.

As noticed earlier, the plea of the defeated candidate regarding the corrupt practices is founded in para 3 of the petition where the allegation made is :

- (a) Expenditure incurred by the returned candidate on the date of nomination, i.e. 7-2-2003 was more than five lakhs by way of hiring of around 100 vehicles for rallying the crowd at Theog and serving food and drinks to the rallyist in his support which were about 10000-12000 in number;
- (b) There has been vulgar display of money by hiring large number of vehicles on later dates as well;
- (c) The returned candidate "while furnishing his account to the District Election Officer, as required as per the law, has purposely concealed these facts and has thus furnished wrong and insufficient account and thus incurred further disqualification as per the Rule 86 and 90 of the Conduct of Election Rules, 1961".
- (d) The returned candidate not only maintained and furnished false accounts but also gave false affidavits to this effect before the District Election Officer which again is a corrupt practice within the meaning of Section 123 (6) of the Act.

It may be noticed that the allegations in the petition "lacks in material facts and material particulars". He does not say that any expenditure was incurred by the returned candidate on telephones, mikes, shamianas, furniture, office rent, electricity and water bills etc. No material fact of such expenditure or material particulars has been given in the petition. He does not say from where the mikes, shamianas, furniture etc., were hired or particulars of the telephones which were used by the returned candidate from the date of his nomination till the declaration of the result. The allegation is vague and nebulous. There is nothing at all to show that to whom this rent of telephones, electricity and water bills etc., was paid. The only example given by the defeated candidate is about incorrect maintenance of accounts.

It is now well settled that an election petitioner is bound to plead in his election petition all the material facts and particulars. Failure to plead material facts is fatal to the election petition and no amendment of the pleading could be allowed to introduce such material facts after the time-limit prescribed for filing the election petition. Similarly, absence of material particulars can be cured at a later stage by an appropriate amendment as held by the Constitution bench of the Apex Court in *Balwan Singh v. Lakshmi Narain*, AIR 1960 SC 770.

The returned candidate also does not disclose the source of his information. The Apex Court in *Virendra Kumar Saklecha v. Jagjiwan* 1972 (1 SCC 826 emphasized the importance of disclosure of sources of information in the affidavit filed along with the election petition. The relevant paragraph at page 830 and 831 reads :

"The respondent filed an affidavit along with the election petition. The affidavit did not disclose the source of information in respect of the speeches alleged to have been made by the appellant. Section 83 of the Act requires an affidavit in the prescribed form in support of allegations of corrupt practice. Rule 94-A of the Conduct of Elections Rules, 1961 requires an affidavit to be in Form No. 25. Form No. 25 requires the deponent to state which statements are true to knowledge and which statements are true to information. Under Section 87 of the Act every election petition shall be tried by the High Court as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. Under Section 102 of the Code the High Court may make rules regulating their own procedure and the procedure of the civil courts subject to their supervision and may by such rules vary, alter or add to any of the rules in the First Schedule to the Code.

The importance of setting out the sources of information in affidavits came up for consideration before this Court from time to time. One of

the earliest decisions is State of Bombay v. Purushottam Jog Naik where this Court endorsed the decision of the Calcutta High Court in Padmabati Dasi v. Rasik Lal Dhar and held that the sources of information should be clearly disclosed. Again in Barium Chemicals Ltd. v. Company Law Board this Court deprecated 'slipshod verifications' in an affidavit and reiterated the ruling of this Court in Bombay case that verification should invariably be modeled on the lines of Order 19 Rule 3 of the Code 'whether the Code applies in terms or not'. Again in A.K.K. Nambiar v. Union of India this Court said that the importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegations.

Counsel on behalf of the appellant contended that non-disclosure of the sources of information in the affidavit was a fatal defect and the petition should not have been entertained. It is not necessary to express any opinion on that contention in view of the fact that the matter was heard for several months in the High Court and thereafter the appeal was heard by this Court. The grounds or sources of information are to be set out in an affidavit in an election petition. Counsel on behalf of the respondent submitted that the decisions of this Court were not on election petitions. The rulings of this Court are consistent. The grounds or sources of information are to be set out in the affidavit whether the Code applies or not. Section 83 of the Act states that an election petition shall be verified in the manner laid down in the Code. The verification is as to information received. The affidavit is to be modeled on the provisions contained in Order 19 of the Code. Therefore, the grounds or sources of information are required to be stated.

The non-disclosure of grounds or sources of information in an election petition which is to be filed within forty-five days from the date of election of the returned candidate, will have to be scrutinized from two points of view. The non-disclosure of the grounds will indicate that the election petitioner did not come forward with the sources of information at the first opportunity. The real importance of setting out the sources of information at the time of the presentation of the petition is to give the other side notice of the contemporaneous evidence on which the election petition is based. That will give an opportunity to the other side to test the genuineness and veracity of the sources of information. The other point of view is that the election petitioner will not be able to make any departure from the sources or grounds, if there is any embellishment of the cast it will be discovered".

(emphasis given).

The affidavit filed by the defeated candidate merely says :

- "1. That the accompanying election petition has been drafted by me.
2. That the contents of paras 1-2 and 5 to 8 of the accompanying petition are correct and true to the best of my knowledge and the contents of paras 3-4 are true on the basis of information derived by me from the documents issued/signed by its originator, which I believe to be correct and true".

In *L. R. Shivaramagowda v. T.M. Chandrashekar*, (1999) 1 SCC 666 a three Judges Bench of the Apex Court ruled :

"Grounds of source of information are to be set out in an affidavit in an election petition. Counsel on behalf of the respondent submitted that the decisions of this Court were not on election petitions. The rulings of this Court are consistent. The grounds or sources of information are to be set out in the affidavit whether the Code applies or not. Section 83 of the Act states that an election petition shall be verified in the manner laid down in the Code. The verification is as to information received. The affidavit is to be modeled on the provisions contained in Order 19 of the Code. Therefore, the grounds or sources of information are required to be stated".

The Apex Court in *Udhav Singh v. Madhav Rao Scindia* 1977 (1) SCC 511 observed that all primary facts which must be proved at trial by a party to establish the existence of a cause of action or his defence, are 'material facts'. In the context of a charge of corrupt practice 'material facts' would mean all the basic facts constituting the ingredients of the particular corrupt practice alleged, which the petition is bound to substantiate before he can succeed on that charge. Whether in an election petition, a particular fact is material or not, and as such required to be pleaded is a question which depends on the nature of the charge levelled, the ground relied upon and the special circumstances of the case. In short, all those facts which are essential to clothe the petitioner with a complete cause of action are 'material facts' which must be pleaded, and failure to plead even a single material fact amounts to disobedience of the mandate of Section 83 (1) (a).

In my view, it was a material fact for the defeated candidate to plead, so as to give notice to the returned candidate of the contemporaneous evidence on which the petition is based. If mikes were used, the material facts which will clothe the defeated candidate with the cause of action would include where those mikes were used, what

was the source of his information regarding the user of such mikes, by and for whom those mikes were hired. Similarly, if expenditure was incurred in erecting shamianas, from whom those shamianas were procured, where they were pitched and on which dates. The absence of material facts and particulars in the petition are fatal to the case of the defeated candidate. There is no plea that expenditure for erection of Shamianas, mikes, telephones, etc., were incurred by any person with the approval, knowledge or authorization of the returned candidate or his election agent. The allegations being without any foundation has no merit. There is no acceptable evidence to show that any expenditure was incurred by the returned candidate in either hiring of the vehicle or payment of their fuel or any related expenditure in connection with the election.

I hardly need to repeat that mere non-disclosure of the expenditure is not a corrupt practice. It is incurring of the expenditure in excess of the prescribed amount which amounts to corrupt practice as defined in Section 123 (6) of the Act. Contravention of Section 77, sub-section (1) and (2) or failure to maintain correct accounts of expenditure with prescribed particulars would not fall within the mischief of Section 123 (6) of the Act (See: *Gajanan Krishnaji Bapat v. Dattaji Reghobaji Meghe* noticed supra).

As noticed earlier, Section 77 (1) of the Act provides that every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorized by the candidate or by his election agent for the election of a candidate by a political party or by any other association or body of persons or by any individual other than the candidate or his election agent shall not be deemed to be and shall not ever be deemed to have been expenditure in connection with the election incurred or authorized by the candidate or by his election agent for the purpose of Section 77 (1) of the Act.

Sub-section (2) of Section 77 says that accounts shall contain such particulars as may be prescribed whereas sub-section (3) provides for total of the said expenditure shall not exceed such amount as may be prescribed.

A reading of Section 77 (1) (2) and (3) along with explanations noticed above read with Section 123 (6) of the Act clearly indicates that in order to constitute a corrupt practice, excessive expenditure must be incurred or authorized by the candidate or his election agent. The expenditure incurred by a third person who is not authorized by the candidate or his election agent, is not a corrupt practice.

In *Megh Raj Patodia v. R. K. Birla* AIR 1971 SC 1295 their Lordships after referring to several authorities even prior to the inclusion of Explanation-1 to Section 77 of the Act, emphasized that to prove corrupt practice of incurring or authorizing expenditure beyond the prescribed limit, it is not sufficient for the petitioner to merely

prove that the expenditure beyond the prescribed limit had been incurred in connection with the election of the returned candidate but he must go further and prove that the excess expenditure was incurred with the consent or under the authority of the returned candidate or his election agent. This view was reaffirmed in *Smt. Indira Nehru Gandhi v. Raj Narain AIR 1975 SC 2299*. In *Smt. Indira Gandhi*, their Lordships ruled that voluntary expenditure by friends, relations or sympathizers of the candidate or the candidate's party is not to be included in the candidate's return of expenses, unless the expenses were incurred in circumstances from which it can be inferred that the successful candidate would reimburse the party or the person who incurred it. Their Lordships further ruled :

"It is not enough to prove that some advantage accrued to the returned or even for the benefit or that it was within the knowledge of the returned candidate and he did not prevent it".

In the present case there is nothing on the record, not a whisper in evidence, which may suggest that any expenditure apart from what is shown in the return was incurred with the knowledge or authorization of the returned candidate or his election agent on the date he filed the nominations.

A Constitution Bench of the Supreme Court in *Dr. P. Nalla Thampy Terah v. Union of India and others AIR 1985 SC 1133* ruled that unless expenditure in fact is incurred by the person authorized by the candidate or his election agent, he cannot be saddled with the expenditure. Indeed a candidate cannot be permitted to place his own funds in the power or possession of a political party, or a trade union or some other person. It is only where a petitioner successfully establishes that the funds were provided by the returned candidate though it would be immaterial who actually made the payments and such expenditure should be included in the return of the election expenses. Their Lordships held :

"The essence of the matter is, whose money it is. It is only if the money expended by a political party, for example, is not laid at its disposal by the candidate or his election agent that explanation 1 would apply. In other words, it must be shown, in order that explanation 1 may apply, that the source of the expenditure incurred was not the candidate or his election agent".

The argument of the defeated candidate is that presumption should be drawn against the returned candidate that the expenditure incurred by his well wishers for bringing the crowd at Theog on the date of nomination of the returned candidate came out of the pocket of the returned candidate. There is no material on record to show even *prima facie* that such expenditure came out of the pocket of the returned candidate. In fact, the persons who hired these vehicles as noticed earlier, have been



produced by the returned candidate who categorically state that the money was spent by the people collectively and they were the persons who collected money and paid to the concerned transport authority.

The returned candidate (RW-5) is categorical in his evidence saying that he maintained a register in the form prescribed reflecting therein the expenditure and he deposited the register with the Tehsildar Elections at Shimla and filed his affidavit as per rules. It is his evidence that he spent about rupees 1,85,000/- in the elections. He goes on to state, *"I did not hire any bus on the day when I filed the nomination papers. I did hire one jeep number whereof is given in my return which I do not remember but the jeep was a Taxi. I did not pay any hire charges regarding any other vehicle on the date I filed the nominations. On the date I filed the nominations, there were about 25 to 30 buses and 25 to 30 vehicles. My supporters had come in these vehicles and they had brought the vehicles for themselves at their own expenses"*. It is his evidence that he along with other three or four persons addressed the crowd gathered and thereafter all of them left for their respective homes. He is categorical that neither he nor any of his supporters provided any food, drinks or liquor to any of the persons gathered at the place. He further states that he did not spend any money on any victory procession when result was declared. It is his evidence. *"I did not ply any vehicle on the date the polling was held"*. According to him, he has opened his election Office at Theog in the building of one Shami alias Sham. He says, *"I did not install any telephone at that place. I did not pay any rent or money for the house of the office space as he was my supporter"*. There is nothing in the cross-examination of this witness which may suggest otherwise. In cross-examination, he retreats and emphasized that he did not use any mike either on the date of filing of the nomination or during the electioneering.

A close scrutiny of the evidence on record, discussed above, clearly shows that the defeated candidate has not been able to prove the factum of the returned candidate having hired vehicles on the date of his nomination to bring crowds or having spent any amount on telephone, mike, shaminanas, rent of the office and furniture etc. etc... There is no satisfactory evidence to come to any other conclusion. The defeated candidate categorically admits in cross-examination his ignorance of the detail of the vehicles which were used and who hired them. He did not even see the rally. The entire evidence led by the defeated candidate is conjectural in nature. No reliance can be placed on such evidence.

So far the contention that the expenditure accounts were not maintained by the returned candidate faithfully and in accordance with the rules. I have already observed that mere non-disclosure of expenditure is not corrupt practice nor irregular maintenance of such expenditure would fall within the meaning of Section 123 (6) of the Act. Any contravention of sub-section (1) and (2) of Section 77 or failure to maintain

correct accounts in the prescribed form will not fall within the mischief of Section 123(6) of the Act. The mischief under Section 123(6) of the Act is confined to the excess expenditure and does not take into its fold the failure to maintain true and correct accounts. It is not given to the defeated candidate to invoke the provisions of Section 100 (i) (d) (iv) of the Act. The reason is that the essential requirement under Section 100 (1) (d) (iv) is that result of the election in so far as it concerns the returned candidate has been materially affected which is not the case before me.

The next contention of the defeated candidate is that some expenditure must have been incurred by the returned candidate on March 1, 2003 the date on which result was declared and the expenditure is not shown in the expenditure return filed by the returned candidate. So far this allegation that "Vijay Rally" was held by the returned candidate on the date of the declaration of result is concerned, it has no foundation in the election petition. This evidence was sought to be introduced by the petitioner in his statement but vide my orders dated April 30, 2004, it was held that as no allegation has been made in the petition and such allegation is made for the first time in the replication and the replication being not part of the pleadings, the defeated candidate cannot be permitted to raise a new plea under the garb of filing a rejoinder or replication.

A defendant, I observed, cannot be taken by surprise. The plaintiff cannot be permitted to lead evidence on a question not founded in the pleading which the defendant had no chance to rebut. It was also held that the replication has to be restricted to file better statement or better particulars in respect of allegations in the election petition and not to raise any fresh ground. The order reads :

"30.4.2004. Present : Petitioner in person

Respondent with Mr. Ajay Kumar, Advocate

On 2nd April, 2004 when the petitioner was examining himself, as his witness, he wanted to state about the alleged expenditure, incurred by the respondent, on the date of declaration of the result, for the "Vijay Rally" organized by the respondent to celebrate the victory, where huge crowd, according to the petitioner, had gathered and no expenditure was shown towards this rally including the transportation of counting agents, preparation of identity cards etc.

Learned counsel for the respondent took an objection that there was no foundation to this allegation in the petition, therefore, the petitioner cannot be permitted to lead evidence about this allegation.

The petitioner submits that he has taken this plea in the replication/rejoinder, which he filed and therefore he is entitled to lead evidence to this effect.

The relevant paragraph in the petition is para (3), which indeed is not in chronological order wherein he pleaded that the respondent incurred expenditure more than what was authorized by law and did not account for expenditure, as stipulated under Section 77 of The Representation of the People Act (Act for short). Para 3 reads

"That the respondent Sh. Rakesh Verma has committed a corrupt practice within the meaning of the Section 123 (6) read with Section 77 of the Representation of People Act, 1951 (hereinafter referred to as the Act) inasmuch as the respondent has incurred expenditure much more than authorized by the law. The Section 77 of the Act clearly stipulates that "Every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorized by him or by his election agent between the date on which he has been nominated and the date of declaration of the result thereof, both dates inclusive". To be precise, the respondent has on 7-2-2003 filed nomination and expenditure incurred on this single day was more than five lakhs by way of hiring of around 100 vehicles for rallying the crowd at Theog and serving food and drinks to the rallyist in his support running in the number of about 10000-12000. Complaint with regard to this with full particulars of the vehicles was sent to the Chief Electoral Officer of Himachal Pradesh through registered letter by the office-bearer of Himachal Vikas Congress, i.e. Sh. Karam Singh and Sh. Chet Ram, the Executive President or Vice President of Theog Mandal of the party, as per the Annexure P-1 annexed to this petition. It is pertinent to submit herewith that total numbers of vehicles were much more than the 100 vehicles, whose registration numbers were noted and furnished to the Chief Electoral Officer, Himachal Pradesh. During entire period of election, there has been vulgar display of money by hiring large numbers of vehicles on later dates as well. The crowd gathered by the respondent in the vehicles was so immense that the same was reported in the newspapers Divya Himachal (Annexure P-1/A) and Ajit Samachar (Annexure P-1/B). It is pertinent to submit herewith that the expenditure incurred on the day of nomination alone exceeds the prescribed expenditure, i.e. Rs. 40 lakhs. Sh. Rakesh Verma while furnishing his account to the District Election Officer, as required as per the law, has purposely concealed these facts and has thus furnished wrong and insufficient account and thus incurred further disqualification as per the Rule 86 and 90 of the Conduct of Election Rules, 1961. The respondent has not only maintained and furnished the wrong and false account, but also filed the false affidavit to that effect before the District Election Officer. The respondent Sh. Rakesh Verma has thus committed corrupt practices in purview of provisions of Section 123 (6) of the Act and has thus rendered his election

liable to be declared as void under the provisions of Section 100 publicised in the media".

It is to be noticed that there is not a whisper about any "Vijay Rally" organized by the respondent or expenditure incurred thereto.

Section 82 of the Act provides for contents of petition—(1) An election petition—

- (a) shall contain a concise statement of the material facts on which the petitioner relies;
- (b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such practice and the date and place of the commission of each such place; and
- (c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings;

A bare reading of Section 83 of the Act makes it clear that the petitioner is obliged to set out all material facts on which he relies including the particulars of any corrupt practice that he alleges, as full a statement as possible of the names of the parties, who committed such corrupt practice including the date, place of commission of each such practice.

As noticed earlier there is not a word in the petition about the "Vijay Rally" organized by the respondent and expenditure incurred thereto. This material fact was omitted from the petition. In his replication, though he made an allegation about the Vijay Rally having been organized by the respondent. The allegation made is :

"There had been Vijay Rally" organized to celebrate the victory of the respondent on the day of result i.e. 1-3-2003, wherein huge crowd of thousands of people gathered and had merry. No expenditure was shown by the respondent on the day of result on the public meeting, transportation of counting agents, preparation of identity cards of counting agents and their means/refreshments etc. etc. If any well wisher had incurred expenditure on all or any of these items, the same ought to have been shown in the election Expenses Return, which has not been done".

The question, therefore, arises whether allegation made in the replication can be made foundation to lead evidence of the fact which does not find mention in the petition. Relying upon a decision of Punjab & Haryana High Court in Ram Singh vs.

Bant Dass *alias* Bant Singh, 2002 (1) Civil Court Cases 194, the petitioner urges that replication is a part of pleadings. I am not persuaded.

Order 8 Rule 9, as amended by Amendment Act, 2002 clearly mandates that no pleading subsequent to the written statement of a defendant other than by way of defence to set-off or counter-claim shall be presented except by the leave of the Court. It is further provided that the Court may at any time require a written statement or additional written statement from any of the parties and fix a time of not more than thirty days for presenting the same.

It is well settled that the plaintiff cannot be permitted to raise a new plea or an inconsistent plea under the garb of filing a rejoinder or replication. The reason is simple. Defendant cannot be taken by surprise and the plaintiff cannot be permitted to lead evidence on the basis of pleading which the defendant has no chance to rebut.

Rule 21 (b) of the Rules of Procedure and Guidance in the matter of Trial of Election Petitions, framed by this Court, clearly provides that the petitioner may be permitted to file replication in the reply generally to any written statement or direct him to file a better statement or better particulars in respect of any matter brought in any written statement. Rule 21 (b) reads:

'21. Commencement of trial :

(a)

(b) At the commencement of the trial or such adjourned date for which all the respondents have been served or are deemed to have been served, the High Court shall scrutinize the pleadings of the parties and may, within such time as it may deem fit, permit the petitioner to file a replication in reply generally to any written statement or direct him to file a better statement or better particulars in respect of any matter brought out in any written statement.

(emphasis given)

(c)

(d)

(e)

A bare reading of this Rule shows that the replication has to be restricted to file better statement or particulars in respect of an allegation or any matter brought out in any written statement. It cannot be used to raise a new plea or make statement of new fact which does not have foundation in the petition.

In this view of the matter, the petitioner cannot be permitted to lead evidence in respect of allegation about the Vijay Rally allegedly organized by the respondent, on the date of declaration of result, as alleged in the replication.

Sd/-
K. C. Sood, J,
30-04-04.

Otherwise also there is no evidence to show that any expenditure was incurred by the returned candidate on the date when the election result was declared. It is in the evidence of the returned candidate that he did not incur any expenditure when the result was declared.

This apart, a careful reading of Section 77 shows that it is only the expenditure which is incurred *"in connection with the election"* which is required to be included in the expenditure return and any other expenditure which is not in connection with the election, is not to be included in the election expenses. Mere fact that Vijay Rally was held after the declaration of the result or thanks giving advertisements appeared in the Newspaper(s) on the very next day of declaration of result cannot lead to the conclusion that such expenditure was incurred by the returned candidate in connection with the election. (See: *Gajanan Krishnaji Bapat v. Dattaji Raghobaji Meghe (supra)*).

The other contention of the defeated candidate is that security deposit of rupees 5000/- was refunded to the respondent on March 5, 2003 and, therefore, this security deposited by the returned candidate could not have been shown as expenditure. The contention is noticed to be rejected. It has no bearing so far the question of excess expenditure in connection with the election is concerned. May be that the returned candidate was extra cautious because security was deposited on the date of filing of the nomination, i.e. February 7, 2003 that this amount has been shown as expenditure.

The next contention of the defeated candidate is that no expenditure has been shown in respect of the public meetings whereas, some of the witnesses speak about the public meetings having been held at Sainj, Kyara, Matiana, Theog, Deha during the election campaign. I have already noticed that there is no evidence to show that any expenditure was incurred in holding these meetings if any.

It is not uncommon that corner meetings are held in the villages by the contesting candidates/without formally organizing such meetings. There is no allegation that any expenditure was incurred in holding these meetings.

There is no acceptable or credible evidence to show that rallies were held by the returned candidate at Sainj, Deha, Basdhar, Matiana and Theog in which he incurred any expenditure.

To sum up, the evidence on record, as discussed above, does not prove that the returned candidate incurred expenditure more than authorized by law as alleged by the defeated candidate and thereby committed corrupt practice within the meaning of Section 123 (6) read with Section 77 of the Act.

The issue is held against the defeated candidate.

Issue No. 2 :

The allegation subject of this issue is that the returned candidate is guilty of threatening and beating the Scheduled Caste Electors and preventing them from casting their vote in free and fair manner at Both No. 7/101 (Dhar Kama and Bagri) and thereby committed a corrupt practice within the meaning of Section 123 (1) (A) and (B) of the Act. In para 4 of the petition, the defeated candidate alleges that the supporters of returned candidate indulged in booth capturing under Section 123 (1) (A) and (B) of the Act as on February 26, 2003, i.e. the date of polling, they threatened and beat up the Scheduled Caste Electors and did not allow to cast their vote in free and fair manner. It is further averred that the names and addresses of the electors so beaten up, threatened and not allowed to cast their vote are given in the complaint sent to the Election Commission of India, Chief Electoral Officer of Himachal Pradesh, District Election Officer, Chief Secretary, Home Secretary, Director General of Police, Himachal Pradesh and Superintendent of Police, Shimla including some other Officers.

The defeated candidate appearing as PW3 says that when the Scheduled Caste people were threatened and beaten up by the supporters of the returned candidate, one Mr. Adi Ram lodged a complaint with the Police. This complaint is mark 'K' and the defeated candidate sent this complaint to the Election Commission of India by fax on February 27, 2003 which is Exhibit PW3/E. So far complaint mark 'K' is concerned. It is not proved. Original complaint was not produced in the Court. Adi Ram, who is supposed to have sent this complaint to the Incharge, Police Post, Deha has not been examined. This complaint purports to be signed by Adi Ram son of Deshia.

The complaint says that on February 26, 2003, the complainant along with Ramesh Chand, son of Bali Ram, Mohan Lal, Atma Ram, Ranjit Singh, Daulat Ram, Ranjit Singh son of Mania, Bali Ram son of Mania, Chet Ram son of Panu Ram, Kewal Ram son of Mehar Singh and other persons of the Scheduled Caste community went to cast their vote at the Polling Station located in the Primary School Dhar where Mohan Lal, Sajju, Manoh, Surinder Tanta, Narinder Tanta, Ramesh Chand, Devinder Singh, another Ramesh Chand, Leela Devi, Mathu Ram, Deep Ram, Rajinder Singh and another Deep Ram prevented them from casting their vote. They told them that

they should either cast their vote in favour of the returned candidate or otherwise they will not be permitted to cast their vote. In these circumstances, they could not cast their vote. They were also threatened that if any complaint is made to any person, then they will be killed. It is also alleged that their telephone wires were snapped and therefore, they could not report the matter to the Police Chowki on that day. This complaint is dated February 28, 2003.

Section 123 (1), (A) and (B) reads :

"123. Corrupt practices.— The following shall be deemed to be corrupt practices for the purposes of this Act.—

(1) "Bribery", that is to say.—

(A) Any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the objects, directly or indirectly, of inducing.—

(a) a person to stand or not to stand as, or to withdraw or not to withdraw from being a candidate at an election; or

(b) an elector to vote or refrain from voting at an election, or as a reward to.—

(i) a person for having so stood or not stood, or for having withdrawn or not having withdrawn his candidature; or

(ii) an elector for having voted or refrained from voting;

(B) the receipt, of, or agreement to receive, any gratification, whether as a motive or a reward.—

(a) by a person for standing or not standing as, or for withdrawing or not withdrawing from being a candidate; or

(b) by any person whomsoever for himself or any other person for voting or refraining from voting, or inducing or attempting to induce any elector to vote or refrain from voting, or inducing or attempting to adduce any elector to vote or refrain from voting, or any candidate to withdraw or not to withdraw his candidature.

Explanation.— For the purposes of this clause the term "gratification" is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward but it does not include the payment of any expenses bona fide incurred at, or for the purpose of, any election and duly entered in the account of election expenses referred to in section 78".

It may be seen that so far sub-section (1) (A) to Section 123 is concerned, any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification to any person whomsoever with the objects, directly or indirectly of inducing a person to stand or not to stand as, or to withdraw or not to withdraw from being a candidate at any election and refrain any one to vote in an election is a corrupt practice.

Bribery under Section 123 (1) is a corrupt practice. The gist of the corrupt practice of bribery is an attempt to do something for those oppose to the candidate with a view to changing their votes as bargain (See: *Dev Raj Anand-Vs-Bhagwandas AIR 1971 SC 241*).

The allegations in the election petition do not fall within the mischief of Section 123 (1) (A) & (B). It is not the case of the defeated candidate that any gift, offer or promise was made by the returned candidate or his agent or by any other person that the consent of the returned candidate or is agent nor is there any allegation of any kind on the gratification as a motive or reward to any elector.

Though sub-section (8) of Section 123 of the Act provides that booth capturing by a candidate or his agent which includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate.

Sub-section (8) of Section 123 of the Act may be reproduced for convenience:

"123. Corrupt practices.—

(1) xxx xxx xxx

(2) xxx xxx xxx

(8) Booth capturing by a candidate or his agent or other person.

Explanation.— (1) In this section the expression "agent" includes an election agent, a polling agent, and any person who is held to have acted as an agent in connection with the election with the consent of the candidate.

(2) For the purposes of clause (7), a person shall be deemed to assist in the furtherance of the prospects of a candidate's election if he acts as an election agent[****] of that candidate.

(3) For the purposes of clause (7), notwithstanding anything contained in any other law, the publication in the Official Gazette of the appointment, resignation, termination of service, dismissal or removal from service of a person in the service of the Central Government (including a person serving in connection with the administration of a Union territory) or of a State Government shall be conclusive proof.—

(i) of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be, an

(ii) where the date of taking effect of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be, is stated in such publication, also of the fact that such person was appointed with effect from the said date, or in the case of resignation, termination of service, dismissal or removal from service, such person ceased to be in such with effect from the said date.

(4) For the purposes of clause (8), "booth capturing" shall have the same meaning as in section 135-A.

Section 135-A reads :

"135-A. Offence of booth capturing.— (1) Whoever commits an offence of booth capturing shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine, and where such offence is committed by a person in the service of the Government, he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years and with fine.

Explanation.— For the purpose of this sub-section and section 20-B, "booth capturing" includes, among other things, all or any of the following activities, namely:—

(a) seizure of a polling station or a place fixed for the poll by any person or persons making polling authorities surrender the ballot papers or voting machines and doing of any other Act which affects the orderly conduct of elections;

- (b) taking possession of a polling station or a place fixed for poll by any persons and allowing only his or their own supporters to exercise their right to vote and prevent others from free exercise of their right to vote;
 - (c) coercing or intimidating or threatening directly or indirectly any elector and preventing him from going to the polling station or a place fixed for the poll to cast his vote;
 - (d) seizure of a place for counting of votes by any person or persons, making counting authorities surrender the ballot papers or voting machines and the doing of anything which affects the orderly counting of votes;
 - (e) doing by any person in the service of Government, of all or any of the aforesaid activities or aiding or conniving at, any such activity in the furtherance of the prospects of the election of a candidate.
- (2) An offence punishable under sub-section (1) shall be cognizable".

Thus coercing or threatening any Elector from going to the polling station or a place fixed for the poll to cast his vote surely amounts to booth capturing within the meaning of Section 135-A and a corrupt practice under sub-clause (8) of Section 123 of the Act.

In the present case, the allegation is that ten persons named above were prevented from casting their vote and they were beaten up.

It is admitted position that neither the returned candidate nor his election agent were present at the Polling Booth of Dhar Karna through the Polling agent of the returned candidate was present. There is no acceptable, reliable or credible evidence on record to prove that any booth capturing took place either at Polling Booth Dhar Karna or at Bagri. The defeated candidate (PW3) in his evidence says that on the date of polling, Scheduled Caste voters were threatened and beaten up by the supporters of the returned candidate. His evidence is based on hear say. This apart, it is not his evidence that such supporters did so at the asking or with the consent of the returned candidate or his election agent or polling agent. He admittedly did not visit polling booth at Dhar or Bagri on the date of polling.

There were five persons, including the Presiding Officers and Security Guard. Now none of these persons, who were allegedly prevented from casting their vote or threatened, lodged any complaint with the Presiding Officer or the security personnel.

As earlier noticed, Adi Ram who filed a complaint with Police Post, Deha, has not been examined though the defeated candidate maintains in his cross-examination

that it was Adi Ram, a Scheduled Caste, who was beaten and prevented from casting his vote. The other witness Sarita Devi (PW12), Ranjeet Singh (PW13), Dinesh Chandel (PW14) and Paras Ram (PW15) do not take the case of the defeated candidate any further. What Sarita Devi says in her evidence is that she belongs to Koli community, a Scheduled Caste. On the date of polling, she went to cast her vote. She noticed a hole in the wall from which people were peeping. She cast her vote and when same came out of the booth, several persons collected and all of them pounced upon her and asked her why she had voted for the congress and not for the returned candidate. She does not name the person (s) who pounced upon her or who questioned her. She is ambiguously silent about it. Then she makes a very vague statement that some Harijan voters did not cast their votes. She does not name who were the persons who were prevented from casting their vote or were forced to cast their votes in favour of the returned candidate. It is significant to note that she did not lodge any protest or made any complaint with the Presiding Officer of the booth or any other officials including a security officer. Then she admits, "I cast my vote without any fear or pressure from any person". This totally demolishes the case of the defeated candidate that she was prevented from casting the vote in favour of a candidate of her choice. She admits that in the booth, there were two polling agents, one of them was of the returned candidate and the other of the defeated candidate. She did not lodge any complaint with any of the polling agents or Presiding Officer to the effect that there was any hole in the wall or the people were peeping into the place where Electronic Voting Machines were placed. The complaint lodged by her is Exhibit PW11/B where there is no mention about any hole having been created in the wall overlooking the place where the EVMs were placed. This witness along with other persons had also filed a writ petition in the High Court making similar allegations. Admittedly, the complaint and the allegations made in the writ petition were enquired and investigated at a high level, i.e. Deputy Superintendent of Police, Superintendent of Police, Station House Officer and verified by Deputy Commissioner. She was confronted with the affidavit given to the defeated candidate (Exhibit R1) and she admitted that the portion of it where she says that she was forced to give her vote is incorrect.

The evidence of this witness does not show any booth capturing on the part of the defeated candidate or his agent.

Ranjeet Singh (PW13) says that Rajputs of the village forced him not to cast his vote according to his free will. He names Dina Ram, Mathu Ram, Narotam and Mohan Lal the persons who asked him to cast his vote in favour of the returned candidate and none else and therefore, he voted in favour of the returned candidate. According to him, he also lodged a complaint with the Election Commission of India and Police Post Deha on February 28, 2003. He too admits that he did not lodge any complaint about forcible voting with either the Presiding Officer or the Polling Officer or any Security guard posted at that place. There is nothing in the evidence of this witness

which may show that he was forced to cast his vote at the instance of the returned candidate or his agent. It is not his evidence that Dina Ram, Mathu Ram, Narotam or Mohan Lal were the agents of the returned candidate.

Dinesh Chandel (PW14) the other witness says that Lakh Ram Sharma was the Polling agent of the returned candidate at Bagri and that said Lekh Ram was pressing the buttons of EVM by holding the hands of old people and pressing the buttons. He protested to the Polling Officer to turn out Lekh Ram from the Polling Booth. After some time, Deputy Superintendent of Police reached and he sent out all the persons from the place but after some time, these persons regrouped. In cross examination he prevaricates himself and says that the Polling agents of all the candidates are permitted to sit in the polling booth. He is unable to give the name of the Polling Officer or other officials who were deployed in the booth. He says that he protested to the Polling Officer but the Presiding Officer took no notice of it. However, he admits he did not give in writing to the Presiding Officer. He says that though he wanted to give it in writing to the Presiding Officer but he was told by the Presiding Officer that he could give in writing later on and, therefore, he did not give the complaint in writing and went back home and returned back only to sign the papers. He admittedly signed those papers without any demur or protest.

It is not the evidence of this witness that the name of the persons who cast votes were not entered in the Elector Roll.

It may be noticed that Section 62 of the Act provides that any person who for the time being is entered in the electoral roll of any Constituency shall be entitled to vote in that constituency. Thus all persons whose names are entered in the electoral rolls were entitled to vote in that Constituency. Neither the defeated candidate nor any other witness says that any objections were raised when electoral rolls were prepared or revised under Section 21 of the Representation of People Act, 1950. Section 21 of 1950 Act provides that electoral roll in each constituency shall be prepared in the prescribed manner and this electoral roll is subject to revision as provided under sub-section (2) and (3) of Section 21. Section 22 provides an opportunity to get any entry in the electoral roll of the Constituency, if it is erroneous or defective, to be corrected. Sub-section (c) of Section 22 specifically provides that on an application made to the Electoral registration Officer, any person can apply for the correction of the electoral roll on the ground that the name of any person should be deleted as that person is dead or has ceased to be ordinary resident of the Constituency or is otherwise not eligible to be registered in the roll.

This apart, Section 61 of the Act provides for procedure for preventing personation of electors. Section 46 of the Act gives a right to a contesting candidate to appoint Polling agents of such candidate at each polling station as also the relief

agents as may be prescribed at each Polling Station. Rule 13 of the Conduct of Election Rules, 1961, herein after referred to as "the rules" provides that a candidate or his agent can appoint one agent or two relief agents as Polling Agents for each polling station as provided under Section 46 of the Act. Rule 36 of the rules stipulates that any polling agent may challenge the identity of a person claiming to be a particular elector by depositing a sum of rupees 2/- in cash with the Presiding Officer for each such challenge. Rule 35 provides that when any elector enters the polling station, his name and other particulars are to be checked in reference to the Electoral roll and then call out the serial number. It is at this point of time that challenge of identity can be made by the polling agent of a candidate in terms of rule 36 of the rules.

In the present case, there is not a word, not a whisper that the Polling agent or their agents challenged the identity of the persons who allegedly impersonated or voted for a dead person. There is also no explanation that why such challenge was not made. This was material fact which ought to have been pleaded to enable the returned candidate to meet the challenge on this ground. It is not the case of the defeated candidate that such challenge could not be made because he was not aware of the entries in the elector rolls. Not only allegation lacks material facts without which it is not possible for the returned candidate to meet the challenge but also the names of the persons who impersonated.

This apart the evicence led, as noticed earlier, is vague and nebulous in nature and does not inspire confidence. Apparent as it is, no challenge was made before the Presiding Officer by deposit of rupees 2/- as contemplated in the rules. Such an allegation is only any after thought. Similar is the evidence of Paras Ram (PW15) which is of no assistance to the defeated candidate. The allegation that buttons of EVM were pressed by Inder Singh, Mangat Ram, Lekh Raj and Surinder Chandel for their own candidate lacks credibility. If such an incident had taken place, definitely he would have lodged a complaint with the Presiding Officer of the Booth and made a protest in writing. Though he says that complaint was given in writing by his son but such a complaint has not seen the light of the day. He also admits in cross-examination, "It is correct the inside the Polling Booth only polling agents of the candidates and the polling party are allowed to sit". Admittedly, neither Inder Singh, nor Mangat Ram or Lekh Raj and Surinder Chandel were the polling agents of the returned candidate. Their presence in the polling booth is highly suspect particularly when there is no report from the Presiding Officer of the booth.

It may be noticed that the persons named in the complaint filed a writ petition in this Court (CWP-PIL) 335 of 2003) making similar allegations in which replies were filed by the District Magistrate, Shimla, Superintendent of Police, Shimla, Station House Officer, Police Station Theog and the Chief Electoral Officer, Himachal Pradesh. In the replies filed by these authorities, it was submitted that these authorities had

enquired into the allegations and found no truth in them. A Division Bench of this Court took notice of the affidavits filed by the authorities that no such incident took place at Polling Booth 7/101 Dhar and that the Polling was peaceful, closed the matter and observed:

"We are satisfied that no further action is called for in this writ petition, which is accordingly disposed of".

So far the complaint lodged with the Police was concerned, the Division bench observed that while considering the cancellation report which had been filed by the Police authorities before the trial court, the trial court shall proceed in accordance with law including issuing a notice to the complainant before passing any final order.

It is the evidence of Mr. Jog Raj (RW3), the Superintendent of Police, at the relevant time, that the matter was investigated and the allegations were not found to be false. He personally verified the investigation and visited the spot pursuant to the directions of this Court in the writ petition. The investigation was found to be correct. The allegations, he says, were found to be false. The final report was submitted to the Court by the Deputy Superintendent of Police. Deputy Superintendent of Police Gurdev Chand Shama (RW6) who investigated the case is categorical in his evidence that the complaint made by Adi Ram was received at Deha Chowki on February 28, 2003 to the effect that some people were not permitted to cast their votes. A case was registered and investigated. The allegations were found to be false in the inquiry and cancellation report was submitted to the Court. The Court asked for re-investigation. In the meanwhile, this witness was transferred. However, in re-investigation also, the allegations were found to be false.

To sum up, there is no evidence on record which may prove that some electors who were voters in Dhar Booth No. 7/101 were threatened or forced to cast their votes in favour of the returned candidate at the instance of the returned candidate or his election agent or any other person under the authority of the returned candidate or his election agent or any of his supporters.

The next allegation of the defeated candidate is regarding booth capturing at Booth No. 7/96 Bagri (Theog). The allegation in the petition reads :

"Yet another incidence of booth capturing occurred at Polling Booth No. 7/96 Bagri (Theog). In this regard the complaint was lodged to the Police on 26-02-2003 by Sh. Bhagat Ram Rathore, President of BJP Mandal at Theog. This is

appended as Annexure P-7 along with the reporting of the matter in Ammar Ujjala. The complaint was lodged to the local police also on 27-02-2003 by Sh. Dinesh Chandel s/o Sh. Paras Ram Chandel, r/o village and P.O. Bagri, the Theog, H.P., who was the Polling Agent of Bhartiya Janta Party at this booth. Copy of this complaint is annexed as Annexure P-8 to this Election petition. The copies of Annexures P-7 & P-8 were sent to the Chief Election Commissioner of India, under Postal Certificate by Sh. Dinesh Chandel s/o Sh. Paras Ram Chandel. Copy of the same is also annexed as Annexure P-9. The respondent committed corrupt practices as envisaged under Section 123 (2) of Act.”.

There is no evidence on record to substantiate this allegation. The petitioner appearing as PW3 merely states:

“There was also booth capturing at polling booth 7/96 Bagri, a complaint regarding which was sent by one Bhagat Ram Rathore. There has been undue influence on the voters of Dhar Kama and Bagri to vote in favour of the respondent”.

In cross-examination, he admits that he did not visit Dhar or Bagri personally. According to him, “I did not visit these two villages even after the election or till today”. The allegation is bereft of any particulars of the incidence at Dhar Kama. No material facts are pleaded. There is not a word that who indulged in booth capturing at the Polling Booth at Bagri and what precisely are the facts of booth capturing or undue influence. The other witnesses pertaining to this allegation are Bhagat Ram (PW4), Head Constable Man Dev (PW11), Dinesh Chandel (PW-14) and Paras Ram (PW15). Bhagat Ram (PW4) deposing regarding this allegation says that on the polling day, he received a complaint from Bagri to the effect that polling agent was being harassed by the workers of the respondent. He immediately lodged a complaint with Station House Officer and Sub Divisional Magistrate, Theog. Copy of this complaint is mark ‘M’ (Exhibit PW11/A). He does not say anything except having made a complaint to S.H.O. Theog. Now this complaint lodged by this witness with the S.H.O. Police Station Theog (Exhibit PW11/A) says that he was informed on telephone that some persons at Bagri Polling station had attempted booth capturing and cast some fake votes. The message was conveyed to him by some B.J.P. Polling agent who resisted this illegal act and while so resisting the act, this polling agent has been beaten by those persons. The complaint reads :

To

The S.H.O.,
Police Station, Theog.

Subject : Information regarding attempt of booth capturing and fake voting.

Sir,

I have been informed through the telephonic message that some persons at Bagari polling station have tried to booth capturing and also casted some fake votes. This message has been conveyed to me by some B.J.P. polling agent. He resisted this illegal act and while resisting this act the polling agent has been beaten by those persons. This is the second attempt of to-day which has been repeated by this criminals. So you are informed accordingly so that the report be registered against doing this unlawful act and to take the necessary action against them. The names and complete addresses shall be furnished by the complainant during his statement U/s 161 Cr.P.C.

It is thus requested that the necessary action in this connection be taken.

Yours faithfully,

Sd/-
Bhagat Ram Rathore.

President B.J.P. Theog Mandal Dated : 26-2-2003

Copy to :

The S.D.M. (Returning Officer) Theog constituency for favour of information and necessary action. This is in continuation to my telephonic call".

It may be noticed that in this complaint, no person has been named who either indulged in casting fake votes or booth capturing. What precise acts were committed by these persons are also not mentioned. He does not say that who gave him the message on telephone. What he says is that this message has been given to him by some B.J.P. Polling agent. To believe this witness is to believe incredible. He was the President of the B.J.P. Mandal at Theog and would know that who was the Polling Agent of the B.J.P., a political party, act Bagri.

H. C. Man Soingh (PW11) was posted as M.H.C. at Police Station, Theog. It is his evidence that that a complaint purports to be that of Bhagat Ram, copy of which is Exhibit PW11/A, was received in the Police Station. Another complaint purporting to be that of Dinesh Chandel was also received in the Police Station from Police Post, Deha. The complaints were found to be false on investigation and no other complaint was received. Now the evidence of Head Constable Man Dev (PW11) unambiguously shows that complaint lodged by Bhagat Ram with Police Station and Dinesh Chandel, on investigation, were found to be false. This witness has not been cross-examined by the defeated candidate on this aspect of the case.

Dinesh Chandel appearing as PW-14 says that he was Polling Agent of Bhartiya Janta Party at Bagri Polling Station and Lekh Raj Sharma was the Polling agent of the returned candidate. Sunil Chandel was polling agent of Congress candidate Rajinder Verma. According to him, Lekh Raj was pressing the buttons of EVM taking into his own hands the hands of old people. He protested and requested the Presiding Officer to turn out Lekh Raj from the Polling Booth. After complaining to the Presiding Officer, he gave information to his party office at Theog. After some time, Deputy Superintendent of Police reached and he scared away all the unconcerned persons from the spot. It is his evidence that though he lodged the complaint with the Police on that day but no action was taken on his complaint. According to him, he was also slapped by a boy who was also a man of the returned candidate. In cross-examination he says that he does not remember the name of the Polling Officer or other polling officials though he says that he challenged the bogus votes but Presiding Officer did not take any action. He admittedly did not challenge any vote in accordance with law and rules noticed in earlier part of the judgement. He admits that he did not give this incidence in writing to the Presiding Officer as he left for home and returned back only to sign the proceedings. Thus, he admittedly signed the proceedings without any protest. He admits that his brother Sunil Chandel was the agent of the Congress and he also did not challenge any vote. He admits that Sector office did visit his polling booth. He did not lodge any complaint with him though he says that he wanted to lodge the complaint but was not permitted by the Sector Officer. To believe this witness is to believe incredible. The entire Election Staff could not have been conniving with the returned candidate. He says that he wanted to complain in writing to the Presiding Officer but did not do so as he left for home. Nothing prevented him from giving the complaint in writing or challenge the votes in writing as provided under the Rules.

Rule 49.J of the Conduct of Elections Rules, 1961 ("1961 rules for short) provides for challenge of identity of a voter. Under this rule, a polling agent is entitled to challenge the identity of a person claiming to be a particular elector by first depositing a sum of rupees 2/- in cash with the presiding officer for each such challenge and on such deposit being made, the Presiding Officer has to enter the name of the elector in the list of challenged voters in Form 14 and require such elector to affix his signatures

in the said list. There after the Presiding Officer is required to hold summary inquiry into the challenge and may for that purpose requires the challenger to adduce evidence in proof of the challenge and the person challenged to adduce evidence in proof of his identity. Sub-rule (5) of rule 49.J of 1961 rules specifically provides that if the Presiding Officer is of the opinion that the challenge is frivolous or has not been made in good faith, he shall direct that the deposit made under sub-rule (1) be forfeited to Government, and in any other case, return the sum deposited to the challenger at the conclusion of the inquiry. If after the inquiry, the presiding officer considers that the challenge has not been established, he shall allow the person challenged to vote and if he considers that the challenge has been established, he shall debar the person from challenging the votes.

Admittedly, the identity of any fake voter was not challenged nor rupees 2/- for the challenge were deposited with the Presiding Officer.

Paras Ram (PW15) was present at Polling Booth Bagri on February 26, 2003 to cast his vote. He says that on the date of polling, Inder Singh, Mangat Ram, Lekh Raj and Surinder Chandel quarreled with his son Dinesh Chandel inside the polling booth as they were pressing the buttons of the EVM for their own candidate. He says that he gave a complaint in writing to the Polling Officer but he said that such complaint should be given to the S.D.M. at Theog. Now this is not even the allegation made by Dinesh Chandel (PW4). According to Dinesh Chandel, only Lekh Ram was pressing the EVM buttons taking into his own hands the hands of old people. He in cross-examination admits that no voter complained to the Presiding Officer that their votes were forcibly cast by some one else or they were forced to cast their vote in favour of a particular candidate. He also admits that inside the polling booth, only polling agents of the parties are allowed to sit. He admits that he did not make any written complaint even to his party office nor his son gave any thing in writing to his party office to which both of them belong.

It is admitted position that no one else excepting Polling agents of the respective candidates are allowed inside the polling booth. It fails comprehension, how Paras Ram was present within the polling booth to know that few persons named by him were pressing the buttons of EVM. The allegation indeed is preposterous.

There is no evidence on record to show that either bogus voting took place by the supporters of the returned candidate or any of his supporters forcibly pressed the EVM button. No protest was raised with the Presiding Officer nor is there any report

of the Presiding Officer of such incidence having taken place. The allegation is not proved.

It may be stated that during the course of evidence of the defeated candidate, evidence was introduced that four vehicles were plied by the returned candidate on the date of election whereas, only two vehicles are permitted to ply by a candidate on election day. This allegation is not founded even in the petition and does not merits consideration. The evidence introduced by the defeated candidate does not prove that four vehicles were plied by the returned candidate on the date the voting took place.

To sum up, the defeated candidate has failed to prove any booth capturing or undue influence as alleged by him. The issue is held against the defeated candidate.

Issue No.3 :

The issue was not pressed and held against the respondent.

Issue No. 4 :

This issue too was not pressed and held against the respondent.

Issue No. 5 :

This issue was also not pressed and is held against the respondent.

Issue No. 6 :

So far this issued is concerned, I have already discussed this issue under various issues and the allegations which are bereft of either full particulars or material facts, cannot be considered. The issue is accordingly decided.

In view of my findings above, I hold that the defeated candidate has failed to prove any of the corrupt practices or undue influence alleged to have been committed by the returned candidate or his election agent or any person authorized by him or his election agent or any of his supporters.

In result the election petition fails and dismissed with cost assessed at rupees 10000/-.

The Registrar General shall immediately communicate the decision in the present election petition to the Election Commission of India and the Speaker of

Himachal Vidhan Sabha alongwith authentic copy of the judgment in accordance with the provisions of Section 103 of the Act.

EMP No. 2 of 2005.

No order.

Sd/-

Dated the 7th October, 2005.

K.C. Sood, J.

Sd/-

Superintendent (Judl.),
High Court of H.P. Shimla.

आदेश से,
हस्ताक्षरित / -
(के० अजय कुमार)
सचिव,
भारत निर्वाचन आयोग।

By order,
Sd/-
(K. AJAYA KUMAR)
Secretary,
Election Commission of India.

